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IN THE

Supreme Court of the United States

OCTOBER TERM 1984

No.

AUGUST CARL BENZ,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION

ANTHONY F. GONZALEZ, ESQ.
ANTHONY F. GONZALEZ, P.A.
701 N. Franklin Street Mall
Tampa, Florida 33602
(813) 224-0431
-and-
SAMUEL R. MANDELBAUM, ESQ.
ANTHONY F. GONZALEZ, P.A.
701 N. Franklin Street Mall
Tampa, Florida 33602
(813) 224-0431
Attorneys for Petitioner

65 pp

QUESTIONS PRESENTED

-I-

WHEN A FEDERAL PROSECUTOR PROVIDES PRE-TRIAL DISCLOSURE OF IMPEACHMENT MATERIALS CONCERNING GOVERNMENT WITNESSES, REPRESENTING THAT "ALL" *JENCKS ACT, BRADY* AND *GIGLIO* MATERIALS HAD BEEN FULLY PRODUCED TO A DEFENDANT PRIOR TO TRIAL, DOES THE DEFENDANT WAIVE HIS RIGHT TO A NEW TRIAL UPON DISCOVERING AFTER TRIAL THAT DESIGNATED *JENCKS ACT* AND VITAL IMPEACHMENT MATERIALS HAD BEEN WITHHELD FROM THE DEFENSE AT TRIAL, WHERE IN RELIANCE ON THE PROSECUTOR'S PRE-TRIAL REPRESENTATION DEFENSE COUNSEL HAD REFRAINED FROM MAKING MOTIONS FOR *JENCKS ACT* MATERIALS AT TRIAL AND SPECIFIC *BRADY* REQUESTS FOR THOSE IMPEACHMENT MATERIALS?

-II-

WHETHER IMPROPER ADMISSION OF EVIDENCE OF A PRIOR CRIME, EVEN IN THE FACE OF OTHER EVIDENCE SUPPORTING THE VERDICT, CONSTITUTES PLAIN ERROR IMPINGING UPON THE FUNDAMENTAL FAIRNESS OF THE TRIAL ITSELF, OR CAN SUCH ERROR BE CURED THROUGH A JURY INSTRUCTION TO DISREGARD SUCH EVIDENCE?

PARTIES BELOW

United States of America

August Carl Benz*

Lawrie Miller

Louis Edward Cowart

Steven Maros

Debra Engh

Michael Ernst

*Petitioner in this Court

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

AUGUST CARL BENZ petitions for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit in this cause, which affirmed the Petitioner's two convictions for (1) conspiracy to import marijuana and (2) filing a false document.

OPINION BELOW

The decision of the Eleventh Circuit *sub judice* is officially reported as *United States v. Benz*, 740 F.2d 903 (11th Cir., 1984), reprinted as Appendix "A".

JURISDICTION

On September 4, 1984, a panel decision written by the Honorable Gerald B. Tjoflat was filed in the Eleventh Circuit, therein affirming the Petitioner's two convictions and sentence.

(App. A, infra). On September 24, 1984, the Petitioner filed a timely Suggestion for En Banc Consideration and Petition for Rehearing. Almost five months later, on February 19, 1985, an order denying both rehearing and en banc consideration was filed in the Eleventh Circuit. (App. B, infra). The jurisdiction of this Court is invoked under 28 U.S.C.§1254(1) and United States Supreme Court Rule 20.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves Rule 16 of the Federal Rules of Criminal Procedure, 18 U.S.C. §3500 (Jencks Act), and the Due Process Clause of the United States Constitution.

STATEMENT OF THE CASE

During the early evening hours of December 17, 1981, United States Customs Patrol Officer Neal McCallum spotted the sailboat *Carpe Diem* floating in the Gulf of Mexico about 3 miles off of Hernando County, Florida (Vol. 41 at page 612). McCallum turned on his patrol vessel's siren and made a complete turn around the sailboat (Vol. 41 at Page 612). Hollering to see if anyone was aboard the *Carpe Diem,* McCallum heard no response but noticed that the vessel had extensive storm damage (Vol. 41 at Pages 612-613). McCallum boarded the deserted *Carpe Diem* and detected some marijuana residue and brown vegetable matter "all over" the 45-foot sailboat (Vol. 41 at Page 613; Vol. 35 at Page 88). The vessel was then "automatically seized," and the Customs Officers scooped up as much residue as they could (Vol. 41 at Page 613). They collected a total of 25.7 grams of marijuana, a little less than an ounce (Vol. 35 at Page 88). Five days later, on or about December 22, 1981, the District Director of Customs in Tampa furnished a Notice of Seizure of the *Carpe Diem* to its registered owner, the Petitioner August Carl Benz (Vol. 1 at Pages 67-D-1 to 67-D-9). As basis

for the seizure, the Notice indicated that "the vessel was used to facilitate the importation of marijuana into the United States contrary to law" (Vol. 1 at Pages 67-D-1). According to Customs Officer McCallum, from the date of the vessel's seizure on December 17, 1981 through January 6, 1982, he did not have *any* information indicating that the Petitioner had anything to do with the importation of marijuana that was found on the *Carpe Diem* (Vol. 42 at Page 641).

A few weeks after receiving the Notice of Seizure, the Petitioner filed a Petition for Remission of Forfeiture with the Commissioner of Customs on January 4, 1982, indicating that he had no knowledge or information that his vessel had, would, or may have been involved in a violation of law (Vol. 1 at Pages 67-D to 67-D-12). The Petitioner stated therein that the *Carpe Diem* was registered to him and his business, Spindrift Charters, Inc., and that he was engaged in the long and short term leasing of charter vessels (Vol. 1 at Pages 67-D-11 to 67-D-12). The Petitioner further stated that at the time of the seizure, his vessel had been leased under a several-month Charter Agreement to an Edgar Picado, a copy of which Charter Agreement was attached to the Petition for Remission (Vol. 1 at Pages 67-D-11 to 67-D-17). Since he was in the charter business and in desperate need of recovering his vessel, the Petitioner requested that his Petition for Remission be handled immediately to prevent further financial hardship (Vol. 1 at Pages 67-D-11 to 67-D-12).

A few days later, on January 6, 1982, the Petitioner exited an apartment complex in Treasure Island, Florida with several other unidentifiable persons. The Petitioner then discarded three large plastic garbage bags into the complex's refuse collection area (Vol. 41 at Page 617-618). Inside these large plastic bags were some materials and magazines bearing Louis Edward Cowart's name, and a piece of [Spindrift Charter Company] letterhead paper with the name "Edgar Picado" written three times on it (Vol. 41 at Pages 619-620).

Over 4 months thereafter, on May 26, 1982, the Petition for Remission was denied by the Office of the United States Attorney for the Middle District of Florida (Tampa), without any reasons noted (Vol. 1 at Page 67-D-22).

About two months following the denial of the Petition for Remission, in July of 1982, Customs Officer McCallum made a number of phone calls to the grandmother of John P. Hunt III, leaving messages that he was trying to het a hold of Hunt (Vol. 40 at Pages 359-360). One evening soon thereafter, while in the Bayou Lounge in St. Petersburg, Florida, Customs Officers McCallum, Al Haines and Bud Baggett approached Hunt and stated that they wanted to talk with him (Vol. 40 at Page 362). The officers brought up the fact that they had information that he (Hunt) had been involved in a smuggling operation on the *Carpe Diem,* but were not going to then place him under arrest (Vol. 40 at Page 363). According to Hunt, he was pretty upset on that evening and was just thinking about himself (Vol. 40 at Page 364). Hunt thought that the only way out "was to tell the truth" ... he didn't have the money to even get a lawyer (Vol. 40 at Page 367). However, Hunt didn't tell them everything he knew at this first meeting with the customs officers (Vol. 40 at Page 367). It was then made known to Hunt that any information given "would help [him] out" (Vol. 40 at 373). At a second meeting with the customs officers about a week or two later, Hunt told them about the "trip," and the officers advised Hunt something to the effect that he would not be prosecuted for his involvement as captain of the *Carpe Diem* (Vol. 40 at Page 373). Hunt was also told that the Government would pay him money to help him out with lodging and everything (Vol. 40 at Pages 375-376).

Thereafter, the Government made the following agreement with Hunt:

> "In return for the complete and truthful testimony of John P. Hunt, the Government has agreed not to prosecute

him for his participation in any criminal incident or transaction which he has fully and truly disclosed upon request. In addition to the conspiracy charged in this indictment, Mr. Hunt has disclosed his participation in other drug smuggling ventures with these defendants and others." (See Government's "Notice of Brady-Giglio Material").

Customs Officer Haines testified that the Government had paid Hunt $5,850 over a four-month period for "statutory witness fees," "subsistence" and "expenses" (Vol. 43 at Pages 836-837; Vol. 40 at Pages 386-388, 375-376). According to Haines, these payments to Hunt had far exceeded the $3,000 maximum limitation on payments to government witnesses, and Haines stated that he had done so without authority through "inadvertence" (Vol. 43 at Pages 843-844).

Three months after the customs officers had approached Hunt, and about 10 months following the seizure of the *Carpe Diem,* the Petitioner was charged in a two-count indictment in the Middle District of Florida filed October 24, 1982 with (1) Conspiracy to import over 1,000 pounds of marijuana, and (2) Producing a false document, i.e. the Charter Agreement attached to the Petition for Remission. Five other persons were also named with the Petitioner as defendants in the indictment: Louis Edward ("Ed") Cowart, Laurie Miller, Steven Maros, Debra Engh, and Michael Ernst (Vol. 1 at Pages 1 to 3).

The trial of the cause had commenced on January 3rd through 11th, 1983 before Middle District Judge George C. Carr. Only the Petitioner and Laurie Miller had appeared for trial, as the four other co-defendants were then fugitives from justice (Vol. 35 at Page 3, Vol. 42 at Page 639). The key witness for the Government was Hunt, who was the only source of evidence indicating that a large-scale transport of marijuana had ever occurred, or that the Petitioner has been involved in such a venture.

At the beginning of the trial on January 3, 1983, the Assis-

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tant United States Attorney announced on the record: "Your Honor, briefly the government did provide [defense counsel] with its Jencks material last Thursday; not only *all* Jencks material, but also its Brady and Giglio material . . ." (Vol. 35 at Page 13). The Assistant U.S. Attorney also stated at trial that the Government had already "indicated that we weren't going to use" evidence against the Petitioner of prior similar acts of drug smuggling (Vol. 39 at Page 282).

As stated in the Eleventh Circuit opinion *sub judice,* this case involved the actions during the summer and fall of 1981 of several people who frequented a St. Petersburg marina named Salt Creek. Some transacted business at the marina: the Petitioner chartered boats, among them the *Carpe Diem;* Debra Engh was Petitioner's secretary; John Hunt was a skilled sailor and sailmaker who had made a set of sails for the *Carpe Diem;* Douglas Lee, Michael Ernst and Steve Maros, who was Debra Engh's boyfriend, had at some point done work around the marina; Laurie Miller, a former Customs Service employee, had lived for a while on a houseboat at the marina, before moving to a house in the area. See *United States v. Benz,* 740 F.2d at 906-907.

According to Hunt at trial, he had captained the *Carpe Diem* in September, 1981 on a trip down to Aruba with Douglas Lee (Vol. 38 at Pages 208, 172, 179). Hunt knew that the Petitioner was the owner of the boat and that co-defendant Ed Cowart "had leased it" (Vol. 38 at Page 179). Hunt further knew that the Petitioner "was in the charter business' with a partner (Vol. 39 at Page 314). In November 1981, Cowart and Maros met Hunt down in Aruba, and they took the *Carpe Diem* to meet a trawler about 6 or 8 miles off the Aruba coast (Vol. 38 at Page 233). Hunt, Cowart and Maros unloaded about 100 bales of marijuana onto the *Carpe Diem* from the trawler and set course back to St. Petersburg, Florida (Vol. 38 at Page 234-235).

Hunt testified further that on December 11, 1981, the *Carpe Diem* rendezvoused off the Florida coastline with another vessel named the "Suzy Q" (Vol. 38 at Page 174). Hunt, Cowart, Maros and Ernst soon unloaded the marijuana from the *Carpe Diem* and brought it all ashore at Cedar Key, Florida, placing the marijuana in a shack (Vol 38 at Pages 186-188). Hunt and the others thereafter decided that they would leave the *Carpe Diem* in "either Mexico or someplace on the coast of Florida" (Vol. 38 at Page 191). Since Maros did not want to go to Mexico, they decided to leave the *carpe Diem* about 3½ to 5 miles offshore of Hernando Beach, Florida (Vol. 38 at Pages 191-192). According to Hunt, the group thereafter stopped at a Hernando Beach marina and "asked them if they could take care of the *Carpe Diem*" (Vol. 38 at Page 193). After that the group went down the street to wait for their ride back to St. Petersburg, about an hour's drive away (Vol. 38 at Page 193). Hunt stated that he subsequently "had conversations with [the Petitioner] and Ed [Cowart] as far as when I would be paid" but Hunt did not specify the purpose of payment. (Vol. 38 at Page 241). Hunt claimed that he collected $13,000, but the record is silent as to who gave him the money.

Hunt testified further at trial that he had become acquainted with the Petitioner through his former sailmaking business, in the St. Petersburg Yacht Club and Salt Creek Marina areas (Vol. 39 at Page 275-277). Hunt had made sails for the *Carpe Diem,* and he would often take out other prospective sail purchasers on the *Carpe Diem* for the promotional purpose of showing off his sails (Vol. 39 at Page 312; Vol. 40 at Page 357). According to Hunt, he had sailed on the *Carpe Diem* as many as twenty or thirty times, including for pleasure races (Vol. 40 at Page 357, 355). Hunt mentioned that the money he was receiving from the Government up to the time of trial had exceeded even his best weeks in the sailmaking business (Vol. 40 at Page 408-409).

According to Hunt, it was Ed Cowart who had first ap-

proached him "about the idea of bringing a load of marijuana into the United States" (Vol. 38 at Pages 202-203; Vol. 39 at Page 309). Hunt indicated that this "first conversation" with Cowart took place one day in September of 1981 at the Salt Creek Boat Yard in St. Petersburg (Vol. 38 at Page 203). When Hunt was asked on direct examination at trial, "Was anyone else present besides yourself and Mr. Cowart when had his first conversation," Hunt answered, "there was Carl Benz and Steve Maros" (Vol. 38 at Page 203). Hunt stated that at this first conversation "[t]here was talk between Ed Cowart, Steve Maros, and Carl Benz as far as a boat that was supposed to leave to pick up a load, and they had problems" (Vol. 38 at Page 204). However, when Hunt was later confronted with his prior grand jury testimony on cross-examination, he admitted that the Petitioner was in fact "not present" at this first conversation (Vol. 39 at Page 309). Hunt had testified before the grand jury:

> "Who first brought the matter of using the CARPE DIEM to bring marijuana into the United States to your attention? Who first talked to you about it?
>
> A It was Ed.
>
> Q All right. *Was anybody else there when he first talked to you about it? Was anybody else present?*
>
> A *No, there wasn't anyone.*" Transcript of Hunt's Grand Jury Testimony dated Sept. 15, 1982, Pages 7-8).

Ed Cowart had spoken alone with Hunt about trying to talk the Petitioner into allowing the use of his boat since the Petitioner "did not want it used" (Vol. 39 at Page 311). According to Hunt, the *Carpe Diem* "had never been used for any smuggling or other illegal activity" (Vol. 38 at Page 312). However, Hunt also stated at trial that the Petitioner had said that his boat could be used "if it were chartered," and if Hunt were to be captain (Vol. 38 at Pages 211, 214). Hunt did "not recall" the date, time or place of this supposed conversation, or just who was present, other than he thought it may have been in September (Vol. 38 at Page 214).

Throughout Hunt's direct and cross-examinations, Hunt never did precisely designate the time, place or persons present at any specific meeting in which the Petitioner had been a conversant in a discussion about the importation of marijuana. Hunt equivocated throughout trial: "there was so many conversations" (Vol. 39 at Page 310); "There were different people at different times" (Vol. 38 at Page 209); "there was so many meetings we had, I can't — it is difficult to put one specific — tie in everything to every conversation we had" (Vol. 38 at Page 223); "I don't know everybody that was involved in it" (Vol. 39 at Page 324).

During the Petitioner's cross-examination of Hunt as to when his (Hunt's) sailmaking business went bankrupt, Hunt answered that it was the same month that his sailmaking partner went "down to Columbia with Carl [the Petitioner] and Tom something, to go and pick up a load" (Vol. 39 at Page 294). Petitioner's counsel promptly moved for a mistrial, which was denied (Vol. 39 at Pages 195-296).

Douglas Lee, a 46-year-old boat repairman and crewman, also testified as a government witness (Vol. 41 at Pages 533-534, 562). In September of 1981, Cowart had approached Lee and hired him at $100 per day to assist Hunt in delivering the *Carpe Diem* down to Cayman and Aruba (Vol. 41 at Page 536-538). When Lee had conversations with Cowart about the voyage, the Petitioner was never present (Vol. 41 at Page 536). While preparing the *Carpe Diem* for the voyage, Cowart had never told Lee of the actual purpose of the trip (Vol. 41 at Page 559). Upon the *Carpe Diem's* subsequent arrival in Aruba, Lee saw Cowart, who gave Lee money for a plane ticket to fly back to Florida (Vol. 41 at Page 538). As Lee was leaving Aruba, he did not have any idea what was going to be done with the *Carpe Diem* or what its purpose was in Aruba (Vol. 41 at Page 541). During the course of the trip, Lee never saw the Petitioner (Vol. 41 at 538).

Lee testified further that in the past the Petitioner had hired Lee on an hourly basis to install a refrigerator, repair some water hoses, and do electrical work on the *Carpe Diem* (Vol. 41 at Pages 535, 539). Lee was aware that the Petitioner was the owner of a company named "Spindrift Charters," and that the *Carpe Diem* had been chartered almost every weekend for the purpose of demonstrating the boat (Vol. 41 at Pages 553-560). He would see the Petitioner as much as ten times a week in the marina, and had gone out on his boat a few times on weekends for races (Vol. 41 at Page 561).

Lee mentioned that on December 20, 1981, a month after he returned from Aruba, he was asked by Debra Engh, the Petitioner's charter company secretary, to go to Hernando Beach to pick up the *Carpe Diem* and bring it back to St. Petersburg (Vol. 41 at Page 542-543, 548-549). Lee tried to locate the vessel, but could not find it (Vol. 41 at Page 543). He eventually was told by the Pasco County (Florida) Police that the *Carpe Diem* had been impounded (Vol. 41 at Pages 543-544). When Lee told the Petitioner that his boat had been seized, the Petitioner was "shocked" (Vol. 41 at Page 559).

Co-defendant Laurie Miller testified at trial in her own behalf that she knew Maros, Cowart, Hunt, Engh and the Petitioner, and that they had been to her home in the past in Tiera Verda, Florida (Vol. 45 at Page 1032). According to Miller, she was aware that the *Carpe Diem* had left the residence at Tiera Verde in August/September of 1981, but was not told by anybody where it went or why it had gone (Vol. 45 at Pages 1015-1016). Miller testified that she had received a phone call one day from Debra Engh, who told her that her car had been broken into and her briefcase stolen (Vol. 45 at Page 1017). Engh needed to borrow Miller's typewriter to retype a certain document that had been stolen along with the briefcase (Vol. 45 at Pages 1017-1018). When Engh returned the typewriter to Miller in a bookstore parking lot, Engh asked her to sign a document for Edgar Picado (Vol. 45 at Page 1018). Miller agreed to

sign Picado's name because shortly before the *Carpe Diem* had departed, since her boyfriend Cowart had mentioned to her "that Edgar had chartered the Carpe Diem" (Vol. 45 at Pages 1019-1020). She had met Picado in Tampa about three or four times in 1979 and 1980, and noticed that Cowart was receiving correspondence and family photographs from Picado (Vol. 45 at Pages 1014-1015).

At first Miller practiced the signature by writing it three times on a piece of Spindrift letterhead paper (Vol. 45 at Pages 1036-1037). According to the best of her recollection, the document was blank when she signed it without the Petitioner's signature on it (Vol. 45 at Page 1035). Engh never told Miller what she was actually going to do with the document (Vol. 45 at Page 1020). When Miller was handed the Charter Agreement at trial, she could not say that she had actually seen that particular document before, but she did verify that the signature on the last page of the Charter Agreement looked like her writing (Vol. 45 at Pages 1016-1017). However, Miller did expressly state that the Petitioner was never present at these particular meetings with her and Engh (Vol. 45 at Page 1023). Nor did Engh ever tell Miller that the Petitioner had directed her to do "these things" (Vol. 45 at Page 1023).

During the Petitioner's cross-examination of Miller, Petitioner sought to have Miller identify a certain letter written by Cowart for admission into evidence (Vol. 45 at Page 1024-1025). This letter, appearing to bear a postmark of December, 1979, had been produced by the Assistant United States Attorney to Petitioner's counsel prior to trial pursuant to Rule 16 of the Federal Rules of Criminal Procedure and *Brady v. Maryland,* 386 U.S. 66 (1967). Petitioner's counsel informed the court that Miller could identify Cowart's handwriting on this letter and a certain phone number therein as being Cowart's (Vol. 45 at Page 1026). In this particular letter, addressed to a Brian Fernandes in Surinam, South America, Cowart asked Fernandes if he was interested in setting up a "pot deal" (Vol. 1 at Pages 93C-8 to 93C-9). Cowart stated therein that he had a boat captain named

"Edgar Picado" and that Cowart would use his "own boat" for the deal (Vol. 1 at Pages 93C-8 to 93C-9). The District Judge sustained the prosecutor's objection to the letter's admission into evidence on "hearsay" grounds (Vol. 34 at Pages 1025-1026).

Warren Hutton, Hunt's 46-year-old landlord, testified as a defense witness (Vol. 44 at Page 921). Hutton mentioned that he had been employed as a neutron device technician for 26 years and has earned an F.B.I. security clearance (Vol. 44 at Pages 922-923). He had known Hunt for approximately 1½ to 2 years and expressed his opinion that Hunt's truthfulness and veracity was "very, very poor" (Vol. 44 at Pages 923, 927). During the period between September 1981 and January 1982, Hutton testified that Hunt was unemployed and intoxicated every night (Vol. 44 at Pages 944-945).

Beverly Scadden, another defense witness, testified that she had been employed by Hunt in his sailmaking business from 1979 to 1981 (Vol. 44 at Page 953). She emphasized in her testimony that she had a "very low opinion" of Hunt's truthfulness (Vol. 44 at Page 955).

At closing, Petitioner stated that Cowart was a "user" who had asked the Petitioner, "Let me charter your boat Carl, Edgar Picado wants to use it" (Vol. 46 at Pages 1179-1180). According to Petitioner, Cowart "put everybody in the middle. That's where [Petitioner] finds himself in this predicament." (Vol. 46 at Page 1181).

At the close of all evidence at trial, the District Judge granted Miller's motion to sever herself as a party from the trial *sub judice* (Vol. 45 at Page 1099). Her re-trial was scheduled for March, 1983.

The jury thereafter set out to deliberate, and returned with a verdict finding the Petitioner "guilty" on both counts of the indictment.

On March 1, 1983, a sentencing hearing was held (Vol. 6 at Page 2). It was then established that the Petitioner was a 40-year-old man with absolutely no prior criminal record, a college graduate from Kent State University, a former Junior High School mathematics teacher, and a distinguished and decorated veteran of the Vietnam War (Vol. 6 at Pages 7-8). The District Judge thereafter sentenced the Petitioner to a five (5) year prison term on the first count, with a concurrent one (1) year term on the second count (Vol. 1 at Page 201; Vol. 6 at Page 13).

After the Petitioner had been convicted and sentenced, Petitioner's counsel suddenly learned of certain documents produced pursuant to the Jencks Act, 18 U.S.C. §3500, to Miller's attorney immediately prior to her re-trial in March, 1983 (Vol. 1 at Page 212, 214A-11). These documents, physically designated as Jencks materials by a new prosecutor handling Miller's re-trial, but withheld from the Petitioner prior to or during his January 1983 trial, consisted of seven U.S. Customs forms signed by Hunt (Vol. 1 at Pages 212 to 214A-11). These forms stated that the $5,850 payments to Hunt had actually been made by the Government as a "Purchase of Information," *not* for statutory witness fees, subsistence or expenses as claimed by the Government at trial. Petitioner filed a motion for new trial based upon *Jencks* and *Brady* violations, which was denied.

In the Petitioner's direct appeal to the Eleventh Circuit, he argued *inter alia,* (a) that the district judge erroneously denied the Petitioner's motion for a new trial after Petitioner's counsel learned that the prosecutor had withheld Rule 16, *Brady* and designated *Jencks* materials, i.e. the "Purchase of Information" statements; and (b) that the district judge should have granted the Petitioner's motion for a mistrial following Hunt's testimony that the Petitioner had previously gone down to Colombia "to go and pick up a load." On September 4, 1984, the Eleventh Circuit filed a decision affirming the Petitioner's convictions and sentences (App. "A", infra).

REASONS FOR GRANTING THE WRIT

I. THE PANEL DECISION DECLINING TO REVERSE THE PETITIONER'S CONVICTIONS FOR *JENCKS ACT, BRADY* AND RULE 16 VIOLATIONS SETS A PRECEDENT CONFLICTING WITH OTHER DECISIONS THAT MANDATE A NEW TRIAL UNDER THE CIRCUMSTANCES *SUB JUDICE,* SINCE THE RECORD SHOWS THAT THE PROSECUTOR HAD WITHHELD DESIGNATED *JENCKS* ACT AND VITAL IMPEACHMENT MATERIALS CONCERNING KEY GOVERNMENT WITNESS HUNT, AFTER REPRESENTING ON THE RECORD THAT "ALL" *JENCKS ACT, BRADY* AND *GIGLIO* MATERIALS HAD BEEN FURNISHED TO DEFENSE COUNSEL PRIOR TO TRIAL.

The Jencks Act, 18 U.S.C.§3500, provides that "a defendant on trial in a criminal proceeding is *entitled* to relevant and competent reports and statements in possession of the Government touching the events and activities as to which a Government witness has testified at the trial." *Goldberg v. United States,* 425 U.S. 94, 104, 47 L.Ed.2d 603, 614, 96 S.Ct. 1338 (1976). "The statutory definition of the term 'statement' was intended by Congress to describe materials that could be fairly used to *impeach* the testimony of a witness." (Emphasis added). *Goldberg,* 425 U.S. at 112. The statute generally requires the production of such materials by the Government "[a]fter a witness called by the United States has testified on direct examination ... on motion of the defendant...."

This Court in *Goldberg* remanded a conviction to the trial court for determination of whether the Government had failed to comply with its obligations under the *Jencks Act.* In setting forth the procedures to be followed on remand to the trial court, this Court in *Goldberg* cited and apparently approved an earlier dissenting opinion of Justices Brennan, Black, Douglas and Warren in *Rosenberg v. United States,* 360 U.S. 367, 375-376, 3 L.Ed.2d 1304, 1309-1310, 79 S.Ct. 1231, 1246 (1959), where it was stated:

> "Although we need not go so far as those courts which have suggested that the harmless error doctrine can never apply as to statements producible under the statute, ... fidelity to the principle underlying Jencks and the Jencks statute requires, I think, that when the defense has been denied a statement producible under the statute, *an appellate court should order a new trial* unless the circumstances justify the conclusion that a finding that such a denial was harmful error would be clearly erroneous. In that determination, appellate courts should be *hesitant* to take it upon themselves to decide that the defense could not have effectively utilized a producible statement." (Emphasis added).

The majority in *Goldberg* expressly recited the standard for review of *Jencks Act* violations:

> "Since courts cannot 'speculate whether [Jencks material] could have been utilized effectively' at trial, ... the harmless-error doctrine must be *strictly* applied in Jencks Act cases." (Emphasis added). — 425 U.S. at 111, note 21, 47 L.Ed.2d at 618, 96 S.Ct. at 1348.

In addition to the *Jencks Act,* the United States Constitution likewise requires disclosure of impeachment materials by the Government. In *Brady v. Maryland,* 373 U.S. 83, 10 L.Ed.2d 215, 83 S.Ct. 1194 (1963), this Court held that disclosure of exculpatory materials by the Government is constitutionally mandated. In reliance upon *Brady,* this Court held in *Giglio v. United States,* 405 U.S. 150, 31 L.Ed.2d 104, 92 S.Ct. 763 (1972), that this constitutional mandate includes disclosure of *all* evidence bearing on the credibility of key government witnesses, concerning the government's "agreements," "arrangements" and "understandings" with those witnesses.

The Eleventh Circuit's opinion *sub judice,* declining to award a new trial for *Jencks Act, Brady* and *Giglio* violations, fails to comport with this Court's aforementioned decisions and conflicts with those of other circuit courts.

The facts in this cause reveal that prior to trial on November 5, 1982, United States Magistrate Thomas Wilson entered an Omnibus Order requiring, "the Government shall disclose all evidence favorable to the Defendant on the issue of guilt, or on matters of impeachment (Vol. 1 at Page 4). Thereafter, on November 19, 1982, the Petitioner filed a further motion for disclosure of all impeaching information concerning any co-conspirator (Vol. 1 at Pages 20-22). On December 3, 1982, Magistrate Wilson entered a second order requiring the Government to disclose *all* impeaching information concerning prosecution witnesses (Vol. 1 at Pages 68-69).

At the beginning of the Petitioner's trial on Monday, January 3, 1983, the prosecutor stated on the record, with the district judge and Petitioner's counsel present, that he had produced "all" *Jencks Act, Brady* and *Giglio* materials to defense counsel during the week prior to trial (on December 30, 1982):

> "MR. ATKINSON [the prosecutor]: Your Honor, briefly, the government did provide Mr. Levinson, Mr. Ficarrotta and Mr. Gonzalez [the Petitioner's counsel] with its Jencks material last Thursday; not only *all* Jencks material, but also its Brady and Giglio material, a copy of its trial brief, its witness list and its proposed exhibit list.
>
> So I believe if he looks carefully over the material he has, he will find that the government has provided all of those items in a more than timely fashion." (Vol. 35 at Page 13). (Emphasis added).

Later at trial, Customs Officer Haines testified that the government had paid key witness Hunt $5,850 over a four month period for "subsistence," "expenses" and "statutory witness fees" (Vol. 43 at Pages 836-837). Haines admitted that these payments had exceeded the $3,000 maximum limitation on payments to government witnesses (Vol. 43 at Pages 843-844). Hunt subsequently testified at trial during his cross-examination that the Customs Officers had paid him money "to help [him] out with lodging and everything" (Vol. 40 at Pages 375-376). At

a post-trial bail hearing, Hunt's testimony revealed that he was actually not under any sort of government witness protection, and moreover, that prior to and during Petitioner's trial he had remained living in St. Petersburg, Florida and regularly frequented the same bars and restaurants there as would the Petitioner. (Transcript of Bail Hearing on January 7, 1983, Pages 50-57). During this time period that he was receiving these monies from the customs officers, he additionally earned $1,500 cash for sailing a boat to Mexico, but did not tell Officer Haines about these earnings. (Id. at Page 56).

The district judge repeatedly restricted the Petitioner's inquiry of Hunt at trial concerning these payments. Petitioner's counsel discounted Hunt's and Haines' explanations for these exorbitant payments, noting to the district judge, "that's not a witness fee." (Vol. 40 at Pages 387-388). As Petitioner's counsel persistently attempted to delve into the *true* nature of these payments, the District Judge constantly interrupted, stating: "I think you have explored this part of it enough. Go on to something else" (Vol. 40 at Page 387); "I think we have heard enough about this. Let's go to another area Mr. Gonzalez." (Vol. 40 at Page 390). Petitioner's counsel eventually noted his objections to the District Judge's restriction of cross-examination concerning the nature of these payments upon the prosecutor's objections:

> "MR. GONZALEZ: Then I am going to go back and find out when the other payments were made. He —
>
> THE COURT: I have heard enough of this on this witness concerning —
>
> MR. GONZALEZ: Judge, I object to the limiting of my cross-examination.
>
> THE COURT: The objection is noted, and it is overruled. Go on to another area now. You have got plenty to show — concerning impeachment." (Vol. 48 at Page 388).

After the Petitioner had been convicted and sentenced, Petitioner's counsel suddenly learned of certain documents produced by a different prosecutor pursuant to 18 U.S.C. §3500 to Miller's attorney immediately prior to her re-trial in March, 1983 (Vol. 1 at Page 212, 214A-11). The first page of these documents is physically marked, "RELEASED BY A.U.S.A.__ _____ TO DEFENSE ATTORNEY _____ ON _____ PURSUANT TO 18 U.S.C. 3500." (Materials are annexed hereto as Appendix "C," infra). These documents, which had not been produced to the Petitioner prior to or during his January 1983 trial, consisted of seven Customs Forms 293 — "Requests for Payment." (App. "C," infra). On these forms, Officer Haines stated that each of these substantial payments to Hunt was for a "Purchase of Information" and "Payment for Information" (App. "C," infra). On March 28, 1983, upon discovering the existence of these designated *Jencks Act* materials, Petitioner's counsel filed a motion for new trial. As grounds therefor, Petitioner stated that that prosecutor assigned to the Petitioner's January 1983 trial had violated his continuing obligation to disclose any and all exculpatory information relevant to impeachment as per *Jencks, Brady* and Rule 16 (Vol. 1 at Pages 212-214). Petitioner's motion for new trial was denied by the District Judge on April 1, 1983 without any reasons given (Vol. 1 at Page 215). The denial was upheld by the Eleventh Circuit, 740 F.2d at 915-916.

On appeal, Petitioner argued that the district judge erred in denying a new trial for concealment of those materials. The Eleventh Circuit held that the Petitioner was summarily barred from claiming any *Jencks Act* and Rule 16 violations:

> "We first note that Benz has no Jencks Act claim because he did not make a proper Jencks Act motion for production of Hunt's statements following the prosecutor's direct examination of Hunt. See *United States v. Liuzzo,* 739 F.2d 541, at 544 (11th Cir. 1984); *United States v. Gatto,* 533 F.2d 264, 265 (5th Cir. 1976); 2 C. Wright, *Federal Practice and Procedure: Criminal 2d* § 438. Nor

> does Benz present a Rule 16 claim because that rule incorporates the limitations of the Jencks Act on discovery of government witness statements. Fed.R.Crim.P. 16(a)(2)." — 740 F.2d at 915.

Likewise, the Eleventh Circuit held that no *Brady* violation had occurred since the Petitioner made no "specific" request for these forms reflecting the payments, and since these designated *Jencks Act* materials "would not have created a reasonable doubt that did not otherwise exist." 740 F.2d at 916.

It is appropriate here to note that receipts for payment signed by informants are "statements" within the meaning of 18 U.S.C. §3500. *Killiam v. United States,* 368 U.S. 231, 242, 7 L.Ed.2d 256, 265, 82 S.Ct. 302 (1961).

The Eleventh Circuit erred in declining to properly consider *Jencks Act, Brady* and Rule 16 violations. Since the prosecutor had represented at the beginning of trial that the government had provided "all" *Jencks Act, Brady* and *Giglio* materials during the week prior to trial, the representation had of course caused the defense attorneys to refrain from repeatedly moving for such materials after each government witness had testified on direct examination. Likewise, it would logically cause defense counsel to refrain from making "specific" requests for the forms and records referring to the payments to Hunt. And the attorneys had an absolute right to rely on the truthfulness of the prosecutor's representation in believing that no further *Jencks Act* and *Brady* materials existed. Under these circumstances it would have been absurd and futile for the defense attorneys to make any requests for materials that had "all" supposedly been produced prior to trial.

In making the foregoing representation to defense consel and the court, the prosecutor had purported to comply with the spirit of *United States v. Campagnuolo,* 592 F.2d 852, 858 note 3 (5th Cir., 1979), in which it was stated, "the Act does not prohibit the prosecutor from disclosing Jencks Act material before

trial, ... that is a salutary practice and we encourage it." The Fifth Circuit had followed the Third Circuit's holding in *United States v. Murphy,* 569 F.2d 771 (3rd Cir., 1978), which held:

> "[for]tunately, there is a prevailing practice by government attorneys of delivering Jencks [Act] material to defense counsel sufficiently in advance of the conclusion of direct examination to obviate trial interruptions solely to permit defense counsel to study the disclosures". Id at 773 n. 5.

The panel decision *sub judice* recognizes the enhanced impeachment value of these *Jencks* materials in holding that they *"would have provided some additional support* for the stringent cross-examination of Hunt and DEA Agent Haines regarding these payments." (Emphasis added). 740 F.2d at 915. This is an understatement, since if produced prior to or during the Petitioner's trial, the jury would have received evidence showing that payment of these excessive monies to Hunt, constituting actual *taxable income,* were directly contingent upon Hunt's ability to furnish incriminating "information" against the Petitioner and others before the grand jury and at trial. While the panel decision speculates unsoundly that these withheld Jencks Act materials were just "usual administrative classification of witness payments," these materials would have actually served as evidence of the government's contingency fee arrangement with Hunt. "Statutory witness fees" do not have such administrative classifications. Nor does the fact that the Petitioner's counsel argued at closing argument that these monies were a "license to lie" suffice to extinguish the disclosure violation, since a lawyer's arguments are certainly no substitute for documentary impeachment evidence. The materials flatly evidence that Hunt had an overwhelming pecuniary interest in manufacturing hard incriminating evidence against the Petitioner in direct exchange for large sums of cash. The jury was misguided by the government witnesses as to the true nature of these monies paid to Hunt and the government's actual relationship with Hunt, and it is very realistic to maintain that the jury

could have considered Hunt's credibility in a much different light if they were truthfully informed that Hunt was periodically earning substantial sums of taxable income by literally selling the names of persons such as the Petitioner, with whom he had lawfully dealt with in the past. The Petitioner's convictions truly turned on Hunt's credibility, and Hunt's credibility alone.

The distinct nature of these contingency monies paid to Hunt cannot be discounted. While "an agreement granting government favors to a prosecution witness in return for truthful testimony about others is not *per se* illegal," any agreement which gives the prosecution witness a pecuniary stake in furnishing incriminating information about others creates an "invitation to perjury." *United States v. Waterman,* 732 F.2d 1527, 1531-1532 (8th Cir., 1984); *United States v. Dailey,* 589 F.Supp. 561 (D.Mass., 1984), *gov't appeal pending,* Case No. 84-1578 (1st Cir.); *United States v. Barash,* 595 F.Supp. 1132 (D.Tex., 1984). In *Waterman,* Chief Judge Donald P. Lay of the Eighth Circuit held such agreements violative of the due process clause since they position the jury "to weed out the seeds of untruth planted by the government." 732 F.2d at 1531-1532.

> "In sum, we are convinced that due process cannot be interpreted to allow the government to reward its witnesses based upon the results of their testimony. There simply is no reason to offer a witness favorable treatment for anything other than truthful cooperation in the government's quest for justice." 732 F.2d at 1533.

And it has long been condemned for the government to procure convictions based on evidence from informers who are paid fees to produce incriminating evidence against particular defendants. *Williamson v. United States,* 311 F.2d 411 (5th Cir., 1963).

The Supreme Court of Florida, construing the Florida Constitution and the due process clause, has recently gone even one step further in *State v. Glosson,* 462 So.2d 1082, 1084 (Fla., 1985). In *Glosson,* the Supreme Court of Florida declared that

an agreement "to pay an informant a contingent fee conditioned on his cooperation in testimony in criminal prosecutions violates constitutional due process," and that dismissal of an indictment under such circumstances is proper. The Florida Supreme Court indicated that such an arrangement "seemed to *manufacture,* rather than detect, crime." 462 So.2d at 1084.

> "We can imagine few situations with more potential for abuse of a defendant's due process right. The informant here had an enormous financial incentive not only to make criminal cases, but also to color his testimony or even commit perjury in pursuit of the contingent fee. The due process rights of all citizens require us to forbid criminal prosecutions based upon the testimony of vital state witnesses who have what amounts to a financial stake in criminal convictions." — 462 So.2d at 1085.

Thus, not only do these withheld *Jencks Act* materials provide substantial additional matters for impeachment, but they indicate that the circumstances under which Hunt came to furnish incriminating testimony against the Petitioner seem to border on the outer fringe of the due process clause.

The panel decision herein is improperly presumptuous in suggesting that these *Jencks Act* materials "would not have created a reasonable doubt that did not otherwise exist." 740 F.2d at 916. Without hesitation these materials are highly relevant on point to Hunt's credibility. Juries are as unpredictable as the weather, and it was error for the Eleventh Circuit panel to attempt to second guess what the jury might have done, or not have done, if it had received evidence showing the true nature and context of these extraordinary payments to Hunt. The panel decision fails to comport with this Court's prior enunciations as to disclosure violations, and conflicts with the following circuit court decisions:

In *United States v. Bibbero,* 749 F.2d 581, 585 (9th Cir., 1984), the court recently reversed a conviction for *Jencks Act* and Rule 16 violations, holding ...

> "On appeal the defendants contend that the government violated the Jencks Act by producing only the second version of the DEA report. We agree. *There are no exceptions to the Jencks rule that all statements relevant to the subject matter of the witness' testimony must be produced* after direct examination of the witnesses. [Citations omitted]. *The statement need relate only generally to the events and activities testified to by the witness to come within its sweep.* [Citation omitted]. A review of Villar's testimony and comparison of the second version with the original report indicates that substantial, deleted portions of the original are generally relevant to Villar's testimony. It is not for the courts to speculate whether the omitted portions could have been used effectively at trial. *Goldberg v. United States,* 425 U.S. 94, 111 n. 21, 96 S.Ct. 1338, 1348 n. 21, 47 L.Ed.2d 603 (1976). We conclude that the substantive rights of both defendants have been violated and accordingly reverse their convictions."

See also: *United States v. Peters,* 625 F.2d 366, 371 (10th Cir., 1980) ("It is, of course, improper for an appellate court to seek to cut corners by considering the relevancy of such material in light of the witness' direct testimony, because this is peculiarly a task for the trial court."); *United States v. Walden,* 578 F.2d 966 (3rd Cir., 1978); *United States v. Butler,* 567 F.2d 885 (9th Cir., 1978) (new trial mandated where prosecutor had concealed "the true nature of its dealings with its key witness," thereby withholding significant impeachment evidence); *United States v. Beasley,* 576 F.2d 626, 630 (5th Cir., 1978) (new trial mandated for *Jencks Act* and *Brady* violations where certain documents containing impeachment evidence were withheld in "good faith").

If the Eleventh Circuit's panel decision is allowed to stand, an inconsistency of constitutional gravity will remain within our nation's courts. More damaging than that, the decision appears to openly condone a prosecutor's concealment of designated Jencks of Act statements and the most vital impeachment materials. Such precedent cannot remain in our jurisprudence.

II. THE PANEL DECISION FINDING AS "CURABLE ERROR" THE ERRONEOUS ADMISSION OF HUNT'S TESTIMONY AS TO THE PETITIONER'S PRIOR EXTRINSIC CRIMINAL ACT, IS INCONSISTENT OTHER DECISIONS WHICH STRONGLY PROHIBIT SUCH EVIDENCE AS BEING "INHERENTLY PREJUDICIAL" AND REVERSIBLE ERROR *PER SE*.

The key question of fact for the jury in this cause was whether a large-scale drug venture had occurred, and if so, whether the Petitioner had knowledge that his charter sailboat would be used by the others to transport a load of marijuana from Aruba to Florida. Prior to trial the prosecutor stated that the government was not going to present any evidence of alleged similar acts of illegality (Vol. 39 at Page 282).

During the Petitioner's cross-examination of Hunt as to when his (Hunt's) sailmaking business went bankrupt, Hunt answered that it was the same month that his partner went "down to Columbia with Carl [the Petitioner] and Tom something, to go and pick up a load" (Vol. 39 at Page 295). Petitioner's counsel promptly moved for a mistrial, noting his concern a few minutes earlier that Hunt was "loaded like a cannon," ready to blurt out non-responsive accusations of prior similar acts (Vol. 39 at Pages 295, 280-281). The District Judge denied a mistrial, but ordered Hunt's reference to this prior "load" stricken and instructed the jury to disregard Hunt's statement in determining the Petitioner's guilt or innocence (Vol. 39 at Page 296). Petitioner argued on appeal that the denial of a mistrial was error. The panel decision held:

> "We do not find Hunt's slip to have been so highly prejudicial as to render the error incurable." — 740 F.2d at 916.

The panel decision seems to suggest in footnote 15 that the jury may not have actually realized that the "Carl," who supposedly went with Hunt's partner to Colombia "to pick up a load,"

referred to the Petitioner. 740 F.2d at 916. This suggestion is untenable, since Hunt had consistently referred to the Petitioner as "Carl" throughout the trial, and there is no other person by the name of "Carl" ever mentioned anywhere in the record. The jury could only have perceived this testimony as indicating that the *Petitioner* had been directly involved in the transport of an earlier load of marijuana from Colombia, and had the propensity to do so.

The panel decision on this point finding "cured" error is inconsistent with prior decisions of other circuit courts, which deem the admission of extrinsic criminal acts of this sort as "inherently prejudicial" and uncurable error, requiring a new trial regardless of whether the evidence the evidence of guilt is substantial or weak. In *United States v. Parker,* 604 F.2d 1327, 1329 (10th Cir., 1979), the court reversed a conviction for admission of a prior crime, holding, "Improper admission of evidence of a prior crime or conviction, even in the face of other evidence amply supporting the verdict, constitutes *plain error* impinging upon the fundamental fairness of the trial itself." (Emphasis added). See also: *United States v. Pagan,* 721 F.2d 24, 31 (2nd Cir., 1983) ("The general rule here applicable is that the erroneous admission of a defendant's prior conviction ordinarily warrants a new trial")' *United States v. Shackleford,* 738 F.2d 776, 783-784 (7th Cir., 1984) ("Except in unusual circumstances, emanations from evidence of a defendant's bad acts are almost always suggestive of a defendant's propensity to commit other bad or criminal acts and tend to impugn his or her credibility, and errors in admitting such evidence consequently often go to the *fundamental fairness* of the trial."); Cf.: *United States v. Sostarich,* 684 F.2d 606 (8th Cir., 1982); *United States v. Pisari,* 636 F.2d 855 (1st Cir., 1981); *United States v. Bramble,* 641 F.2d 681 (9th Cir., 1981), *et al.*

Moreover, other circuit court decisions have held that such errors cannot be cured through an instruction to the jury to disregard evidence of prior crimes. See *United States v. Figuerroa,*

618 F.2d 934, 944 (2nd Cir., 1980) (cautionary instruction was insufficient to cure testimony of the defendant's prior narcotic conviction in drug trial since it was "inconceivable that knowledge of [the defendant's] prior conviction did not play some significant part in the decision of at least some of the jurors to find [the informant's] accusations of [the defendant] credible"); *United States v. Hans,* 738 F.2d 88, 94-95 (3rd Cir., 1984) (cautionary instruction at bank robbery trial insufficient to erase "indelible impression" of inferred propensity to rob banks, because of highly prejudicial impact of testimony of prior robberies); *Helton v. United States,* 221 F.2d 338 (5th Cir., 1955) (it is doubtful that any instruction, however strong, could suffice to cure the prejudice of testimony at a drug-related trial that the defendant was a previous marijuana user); *United States v. Boyd,* 595 F.2d 120, 127 (3rd Cir., 1978), *et al.*

The evidence in this case was far from "overwhelming," and primarily derived from Hunt's uncorroborated testimony. Based upon Hunt's testimony of the Petitioner's involvement in an earlier "load" of marijuana from Colombia, the jury could have only perceived a very sinister picture of the Petitioner: that he had the propensity towards smuggling in drugs. It is inconceivable that Hunt's statement did not play at least some significant part in the jury's determination of guilt. The prejudice against the petitioner was incurable, even with the given cautionary instruction, and was devastating to the Petitioner. The aforesaid decisions resoundingly deem the erroneous admission of testimony of prior criminal acts to be "inherently prejudicial" and bordering on reversible error *per se,* and the panel decision's determination that Hunt's accusation is "not ... so highly prejudicial" and "cured" error is inconsistent with fair jurisprudence.

CONCLUSION

For all of the foregoing reasons, it is respectfully prayed that the writ of certiorari be granted.

Respectfully submitted,

ANTHONY F. GONZALEZ,
ESQUIRE
and
SAMUEL R. MANDELBAUM,
ESQUIRE of
ANTHONY F. GONZALEZ, P.A.
701 N. Franklin Street
Tampa, Florida 33602
Phone: (813) 224-0431

APPENDIX

APPENDIX A

UNITED STATES of America
Plaintiff-Appellee.

v.

August Carl BENZ,
Defendant-Appellant.

No. 83-3168

United States Court of Appeals,
Eleventh Circuit.

Sept. 4, 1984.

Anthony F. Gonzalez, Samuel R. Mandelbaum, Tampa, Fla., for Benz.

Lee W. Atkinson, Karla R. Spaulding, Asst. U.S. Attys., Tampa, Fla., for U.S.

Appeal from the United States District Court for the Middle District of Florida.

Before GODBOLD, Chief Judge, TJOFLAT and HENDERSON, Circuit Judges.

TJOFLAT, Circuit Judge:

August Carl Benz was convicted in the district court on a two-count indictment of conspiracy to import over 1,000 pounds of marijuana into the United States and to possess that marijuana with intent to distribute (count one)[1] and of submit-

[1]Benz and five others were charged in count one under 21 U.S.C. §§ 846, 963 (1982) with conspiring to violate 21 U.S.C. §§ 952(a), 960 (1982) (proscribing the importation of controlled substances, including marijuana) and 21 U.S.C. § 841(a) (1982) (proscribing the possession of controlled substances, including marijuana, with intent to distribute). Sections 846 and 963 contain identical language but deal with different subchapters of the drug law: section 846 refers to Subchapter I, Control and Enforcement; section 963 refers to Subchapter II, Import and Export. These two sections provide:

> Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

ting a false statement and document to the U.S. Customs Service in an effort to recover his sailing vessel which Customs had seized after the marijuana had been imported (count two).[2] Benz appeals, questioning the sufficiency of the evidence to sustain his convictions and several of the district court's rulings, both before and during his trial. We conclude that the jury had ample evidence to convict Benz on both counts of the indictment and that the district court's challenged rulings were correct. We therefore affirm.

I.

The crimes in this case involved the actions during the summer and fall of 1981 of several people who frequented a St. Petersburg marina. Some transacted business at the marina: appellant Benz chartered boats, among them the *Carpe Diem,* a forty-eight foot sail boat; Debra Engh was Benz' secretary, John Hunt was a skilled sailor and sailmaker who had made a set of sails for the *Carpe Diem*; Douglas Lee, Michael Ernst, and Steve Maros, who was Debra Engh's boyfriend, had at some point done some work around the marina; Laurie Miller had lived for a while on a houseboat at the marina, before moving to a house in the area. She was a former employee of the U.S. Customs Service and knew many of the Customs officers stationed in the area. Ed Cowart was her boyfriend.

In September 1981, Cowart and Hunt discussed the possibility of smuggling a load of marijuana into the United States. They broached the idea with Benz, Maros, and Miller, and soon

[2]Benz and two of the conspirators indicted in count one, Laurie Miller and Debra Engh, were charged in count two under 18 U.S.C. §§ 1001, 2 (1982). Section 1001 provides:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States [e.g., U.S. Customs Service] knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Section 2 provides

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

they all agreed on a plan to transport several thousand pounds of marijuana from Aruba, in the Lesser Antilles, to Florida aboard Benz' sailboat, the *Carpe Diem*. Hunt, as captain, would sail the vessel; Maros and Lee would serve as the crew during portions of the voyage. Miller showed them photographs of several Customs agents she knew whom they might encounter during their trip.

In late September, Hunt and Lee set sail from St. Petersburg, bound for the Cayman Islands. There Hunt placed a telephone call to Cowart for instructions on how to proceed once the *Carpe Diem* got to Aruba. Hunt was unable to reach Cowart, however, so he called Benz. He asked Benz to have Cowart call him in the Caymans, and Cowart subsequently did so. Thereafter, Hunt, Lee, and Maros, who had joined them, sailed for Aruba. Following Cowart's directions, they met a trawler off the coast of Aruba and took on around 200 forty to fifty pound bales of marijuana. By this time, it was early December 1981. The *Carpe Diem* then sailed to a point off the Florida coast where they rendezvoused with Cowart and Ernst who were aboard the *Suzi Q*. The two vessels proceeded to Cedar Key and off-loaded the marijuana there. Hunt and Maros then sailed the *Carpe Diem* to a point off the west Florida coast, near Hernando Beach, where they left the boat. They then returned to St. Petersburg. Hunt later spoke with Benz and Cowart about when he would be paid for his efforts; he eventually collected over $13,000.[3]

On December 17, 1981, Customs Officers on routine patrol found the abandoned *Carpe Diem*. They seized the boat[4] and collected marijuana residue from its deck. On December 19, a Coast Guard officer found the *Suzi Q* anchored elsewhere off the Florida coast. It too was unoccupied and covered with marijuana residue.

Meanwhile, Benz sent Douglas Lee to retrieve the *Carpe Diem*, but Lee could not find the boat because it had been seized. Customs subsequently sent Benz a notice of seizure; he responded with a Petition for Remission or Mitigation of Forfeiture, prepared by his attorney. Attached to the petition was a

[3]The record does not indicate who gave Hunt the money.

[4]Customs seized the *Carpe Diem* under the authority conferred by 19 U.S.C. § 1595a (1982).

charter agreement purporting to show that the *Carpe Diem* had been chartered by Benz to an Edgar Picado at the time of the seizure. The signature "Edgar Picado" was in Miller's handwriting.

Customs managed to learn of Hunt's involvement in the smuggling incident and persuaded him to testify against the others. On September 16, 1982, Benz, Miller, Cowart, Engh and Maros were indicted. All were charged with conspiracy to import and to possess with intent to distribute marijuana;[5] Benz, Miller, and Engh were charged with submitting a false statement and document to Customs in an effort to recover the *Carpe Diem*.[6] Benz and Miller were arrested; the other indictees became fugitives and are still at large.

Prior to trial, Benz moved the court to dismiss the indictment, contending that it had been returned against him in retaliation for his efforts to recover the *Capre Diem*. Benz also moved for a severance of parties and of counts. He sought a severance of counts because he wished to tesify only to count two of the indictment. The court denied Benz' motions to dismiss and for severance, and the case proceeded to trial.

The trial began with opening statements by counsel both for the government and Benz. The government's statement was straightforward; the government would prove that Benz was one of the principals of the smuggling enterprise and that he submitted a false statement and document to Customs in an effort to set aside the government's forfeiture of the *Carpe Diem*. Benz' false statement, contained in his affidavit, was that the *Capre Diem* was under charter to Edgar Picado during the period of time covered by the conspiracy and that he, Benz, had played no role in the smuggling venture. The false document was a fake agreement purporting to establish that Benz had chartered the *Carpe Diem*to Picado. Benz' opening statement was somewhat equivocal. He denied outright any involvement in the smuggling venture, but he offered no explanation for the false charter agreement which, the parties stipulated, bore his genuine signature and the name Edgar Picado signed by Laurie Miller.

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[5] *See supra* note 1.

[6] *See supra* note 2.

In its case-in-chief the prosecution established the facts we have related *supra*, principally through the testimony of Hunt, Douglas Lee, and the Customs officers who seized the *Carpe Diem* and the *Suzi Q*. The government also proved that, following Customs seizure of the *Carpe Diem*, Benz had possession of a piece of letterhead stationery from his boat chartering business, with the name Edgar Picado written on it several times in Laurie Miller's handwriting.

In his defense Benz called three witnesses, Benz' brother and two witnesses who simply attacked Hunt's credibility. Benz' brother testified that Benz had shown him a blank charter agreement in the month preceding the smuggling trip, asking if it accorded him, as a charterer, sufficient protection for a long-term charter he was about to make. In turn, Benz' brother had shown the document to his lawyer, who had approved it. Benz attempted to place into evidence records from his charter business without authenticating them. He was the only person who could authenticate the record, but he would not take the witness stand. The court consequently excluded the evidence, and Benz' defense rested.

Miller then presented her defense and chose to testify. She denied participating in the smuggling scheme. She admitted that she had known the other indictees socially but insisted that that was all. She also admitted that she had signed Edgar Picado to the charter agreement Benz had presented to Customs with his Petition for Remission or Mitigation of Forfeiture. Miller explained that she signed Picado's name at the request of Benz' secretary, Debra Engh, because she thought from something that Cowart had told her that Edgar Picado had in fact chartered the *Carpe Diem*.

Benz cross-examined Miller. During the course of the examination he sought to have Miller identify copies of an undated handwritten letter and an envelope, apparently composed and mailed in December 1978,[7] and to introduce them into evidence. The letter, purportedly from Cowart to a man in South America, described a scheme for smuggling marijuana aboard a boat to be captained by Picado. Both the prosecutor and Miller objected on hearsay grounds to the receipt of evidence of the letter and envelope, and the court sustained their objection.

[7]The letter was undated. The envelope was postmarked. The postmark is barely legible, but appears to indicate a December 1978 date.

Miller then announced that she intended to call Benz as a witness. Outside the jury's presence Benz stated that he would invoke his fifth amendment right to remain silent in response to any question Miller asked. He added that he would testify if the court severed the conspiracy count from the case. The court declined to do so,[8] and Benz did not testify. Miller's final witness would have been Benz' trial attorney.[9] The court, sustaining Benz' objection, refused to allow him to testify, however.

At the close of all the evidence, Miller moved for a mistrial on the ground that the court's ruling concerning the attorney's testimony materially prejudiced her defense. The court granted her motion and severed her from the case. At this point, Benz moved the court to strike Miller's testimony from the record and to instruct the jury to disregard it. His motion was denied.

Benz' closing argument to the jury resembled his opening statement. His attorney reiterated that the government had not shown Benz to have been a member of the smuggling enterprise. He then implied that Benz had thought the false charter agreement to be genuine. Later, he implied that Benz had chartered the boat to Cowart or to Hunt and that Picado may have been involved with them in the background. The jury was not persuaded; it returned verdicts of guilty on both counts of the indictment.

On appeal, Benz presents seven claims of error. One calls for us to acquit him; the rest call for us to grant him a new trial.

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[8]Arguably, Benz' statement, that he would testify if the court severed the count one conspiracy charge from the case, was tantamount to a moton for a mistrial for both defendants as to that charge. Miller, however, did not request such relief, thus indicating that she wished to proceed to a verdict on both counts of the indictment with the jury that had been empanelled to try the case. Accordingly, a declaration of mistrial as to Miller would have operated under the double jeopardy clause to acquit her of the count one conspiracy charge unless manifest necessity for the mistrial existed. *See United States v. Dinitz*, 424 U.S. 600, 608, 96 S.Ct. 1075, 1080, 47 L.Ed.2d 267 (1976).

[9]Benz' counsel would have testified that Miller was never present during his preparation of Benz' Petition for Remission or Mitigation of Forfeiture, allowing the inference that she did not know, when she signed the form, that it would be submitted to Customs. The law on whether such knowledge was an element of the 18 U.S.C. § 1001 (1982) offense was unclear at the time this case was tried. However, the Supreme Court, in *United States v. Yermian*, _____ U.S. _____, 104 S.Ct. 2936, 82 L.Ed.2d 53 (1984), has now decided that knowledge that a false statement is in the jurisdiction of a government agency is not an element of a section 1001 offense.

He claims that he is entitled to a new trial on the following grounds. First, the trial judge erred in instructing the jury on the conspiracy element of the count one offense. Second, the judge erred in denying his motion for a severance of courts. Third, the judge erred in allowing Miller's testimony to go to the jury after granting her a mistrial. Fourth, the prosecution failed to disclose certain Jencks Act statements and *Brady* material. Fifth, the judge should have granted him a mistrial when Hunt, on cross-examination in the government's case-in-chief, referred to a prior drug smuggling incident involving Benz. Sixth, a claim raised in his reply brief to this court, the judge erred in excluding the Cowart letter that referred to Picado.

II

In reviewing the sufficiency of the evidence to support Benz' convictions, we must view the evidence in the light most favorable to the government, "drawing all reasonable inferences therefrom, and making the credibility choices that support the jury's verdict [to determine whether] a reasonable jury could have found [Benz] guilty beyond reasonable doubt." *United States v. Pierre*, 688 F.2d 724, 725 (11th Cir.1982). The evidence may be sufficient though it does not "exclude every reasonable hypothesis of innocence or [is not] wholly inconsistent with every conclusion except that of guilt." *Id.* We conclude that the evidence presented at Benz' trial was plainly sufficient to convict him on both counts of the indictment.

The prerequisites to a finding of guilt on the conspiracy count are proof beyond a reasonable doubt of the conspiracy's existence, Benz' knowledge of it, and his agreement to become a member. *United States v. Marszalkowski*, 669 F.2d 655, 661 (11th Cir.), *cert. denied*, 459 U.S. 906, 103 S.Ct. 208, 74 L.Ed.2d 167 (1982). Benz was present at several meetings where the smuggling venture was discussed. His boat was used to transport the marijuana. He asked Hunt to captain the boat. He acted as liaison between Hunt and Cowart once during the trip. Finally, Benz knew to send Lee to look for the *Carpe Diem* at Hernando Beach where Hunt and Maros had left it. A jury could reasonably infer Benz' knowledge of and participation in an extant conspiracy to import marijuana into the United States.

A jury could also reasonably infer that Benz knowingly and

wilfully presented a false statement and document to Customs, as alleged in count two. Benz' attorney filed the Petition for Remission or Mitigation of Forfeiture with Customs so that Benz could recover the *Carpe Diem*. He attached to the petition Benz' affidavit and a false charter agreement purporting to show that Benz had chartered the *Carpe Diem* to Edgar Picado. Picado's signature had been forged by Laurie Miller after she had practiced signing it several times on a piece of stationery bearing the letterhead of Benz' charter company. Benz subsequently had this piece of stationery in his possession. The reasonable inferences from these facts were that Benz knew the charter agreement was false and that it would be submitted to Customs with an affidavit containing his false statements about the transaction.[10]

III.

A.

Benz requested that the jury be instructed as follows:

> "Even though the defendant's presence at the scene of a crime might be 'highly suspicious,' 'this is not a substitute for evidence sufficient to prove beyond a reasonable doubt. Although it is certainly possible—maybe even probable—that (the Defendant) was involved in the conspiracy, such speculation does not constitute proof beyond a reasonable doubt, and juries must not be permitted to convict on suspicion and innuendo.'" *U.S. v. DeSimone*, 660 F.2d 532 at 537, *U.S. v. Rozen*, 600 F.2d 494 at 497, and *United States v. Littrell*, 574 F.2d 828, 833 (5th Cir., 1978).
>
> * * * * * *
>
> "In order for the Government to prove the Defendant's involvement in a conspiracy beyond a reasonable doubt, 'it is not enough for it merely to establish a climate of activity that reeks of something foul'" — *DeSimone*, 660 F.2d at 537 and *U.S. vs. Wieschenberg*, 604 F.2d 326 at 331-332.

The district judge denied his request.

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[10]It should be noted that knowledge that the document would be submitted to Customs was not a prerequisite for liability under 18 U.S.C. § 1001 (1982). *United States v. Yermian, supra* note 9.

The court's refusal to deliver Benz' requested instruction constituted reversible error only if the requested instruction (1) was correct, (2) was not substantially covered by the court's charge to the jury, and (3) dealt with some point in the trial so important that the failure to give the requested instruction seriously impaired the defendant's ability to conduct his defense. *United States v. Stone*, 702 F.2d 1333, 1339 (11th Cir.1983).

In this case, the judge gave Fifth Circuit Pattern Jury Offense Instruction 3, on conspiracy, which stated in relevant part:

> Of course, mere presence at the scene of an alleged transaction or event or mere similarity of conduct among various persons and the fact that they may have associated with each other, and may have assembled together and discussed common aims and interests does not necessarily establish proof of the existence of the conspiracy.
>
> Also, a person who has no knowledge of a conspiracy, but who happens to act in a way which advances some object or purpose of a conspiracy, does not thereby become a conspirator.
>
> * * * * * *
>
> Of course, mere presence at the scene of a crime and knowledge that a crime is being committed are not sufficient to establish that a defendant either directed or aided and abetted the crime, unless you find beyond a reasonable doubt that the defendant was a participant and not merely a knowing spectator.

These instructions substantially covered the instructions Benz requested. Accordingly, the judge did not err in refusing to give those instructions.

Benz next argues that the judge erred in omitting the pattern jury instructions on overt acts from the charge he gave. The former Fifth Circuit has held that no allegation or proof of an overt act is required for a conviction under 21 U.S.C. §§ 846 or 963, the statutes on which the count one conspiracy charge was founded in this case. *United States v. Rodriguez*, 612 F.2d 906, 919 n. 37 (5th Cir.), *cert. denied*, 449 U.S. 835, 101 S.Ct. 108, 66 L.Ed.2d 41 (1980). Accordingly, a jury instruction regarding overt acts was unnecessary. We agree with the Seventh Circuit's

observation that "[i]f an overt act need not be charged, it need not be proved. If an overt act need be neither charged nor proved, there remains nothing about which to instruct on that issue." *United States v. Umentum*, 547 F.2d 987, 991 (7th Cir. 1976), *cert. denied*, 430 U.S. 983, 97 S.Ct. 1677, 52 L.Ed.2d 376 (1977). *See also United States v. Brown*, 692 F.2d 345, 348 (5th Cir.1982).

B.

Benz claims that the district judge abused his discretion in refusing to sever counts one and two for trial.[11] The grant or denial of such a severance is within the discretion of the trial court and that denial will not warrant reversal unelss clear prejudice is shown. *United States v. Park*, 531 F.2d 754, 761 (5th Cir.1976). The burden of demonstrating prejudice is a difficult one and the ruling of the trial judge will rarely be disturbed on review. *Id.* at 762 (quoting *Tillman v. United States*, 406 F.2d 930, 934 (5th Cir.1969)), *vacated in part on other grounds*, 395 U.S. 830, 89 S.Ct. 2143, 23 L.Ed.2d 742 (1969).

In deciding the motion to sever under Fed.R.Crim.P. 14, the trial judge was required to balance the prejudice to the defendant against the interests of judicial economy. *United States v. Forrest*, 623 F.2d 1107, 1115 (5th Cir.), *cert. denied*, 449 U.S. 924, 101 S.Ct. 327, 66 L.Ed.2d 153 (1980). Where, as here, the defendant sought a severance of counts because he wished to testify to the false statement charge but not the conspiracy, he was required to demonstrate "that he ha[d] both important testimony to give concerning one count and strong need to refrain from testifying on the other." *Id.* (quoting *Baker v. United States*, 401 F.2d 958, 977 (D.C. Cir. 1968), *cert. denied*, 400 U.S. 965, 91 S.Ct. 367, 91 S.Ct. 367, 27 L.Ed.2d 384 (1970)).

Benz contends that if he had been able to testify in defense

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[11] Fed.R.Crim.P. 14 provides, in pertinent part:

> If it appears that a defendant . . . is prejudiced by a joinder of offenses . . . in an indictment . . . or by such joinder for trial together, the court may order an election or separate trials of counts, . . . or provide whatever other relief justice requires. . .

It should be observed that the two counts in this case were properly joined under Fed.R. Crim.P. 8(a) initially since they were certainly based on the same "transaction or two or more acts or transactions connected together or constituting parts of a common scheme or plan," as that rule contemplates.

of the false statement count alone, he would have presented the following "important" evidence which he proffered to the trial judge. First, he would have introduced some business records indicating that he had a legitimate charter business. Second, he would have testified to what he said in the affidavit he submitted with his Petition for Remission or Mitigation of Forfeiture; i.e., that he had chartered the *Capre Diem* to Edgar Picado from September 9, 1981, to December 30, 1981, and that he did not know or have reason to believe that Picado would engage in unlawful conduct during the charter period.[12]

Benz asserts that he had a "strong need to refrain from testifying" on the conspiracy count because he would have been subject to broad cross-examination regarding his business and social relationships with the alleged coconspirators, arousing the jury's speculation that "these legitimate involvements extended into the illicit." He submits that his relationship with the parties to the conspiracy would have been irrelevant in a trial restricted to count two and thus would not have been exposed either in the government's case-in-chief or in the government's cross-examination of him about the existence of a charter agreement with Edgar Picado.

We note initially that Benz misjudges the extent to which he could have limited his cross-examination had count two been tried alone. As the district court pointed out in denying Benz' motion for a severance of counts, at a trial restricted to count two the prosecutor could have exposed the smuggling enterprise and Benz' involvement in it in order to show why Benz might have been inclined to fabricate the charter agreement. And if Benz took the stand, he would have subjected himself to the same cross-examination he would have faced had he testified in the proceedings below. *Cf. United States v. Bronco*, 597 F.2d 1300, 1302 (9th Cir.1979) (denial of motion for severance reversible error because of prejudice to defendant where "same jury would hear the evidence of all crimes and [defendant] would not be able to testify about one set of events without being cross-examined on the other.") Moreover, Benz' testimony

[12]Benz also requested the court to grant him an *in camera* hearing so he could proffer other testimony without running the risk of a prosecution "discovery session." The court denied this motion, and Benz made no proffer. Benz has not informed us of what he would have submitted *in camera*; accordingly, we have no additional evidence to weigh in evaluating any prejudice Benz may have suffered.

could be used by the government in its case-in-chief or as impeachment in a subsequent trial on the conspiracy count. *See* Fed.R.Evid. 804(b)(1). Knowing this, Benz might well have decided not to testify if he had been granted a severance.

Putting aside the weakness in Benz' argument that he had a strong need to refrain from testifying in defense of the conspiracy charge, however, we find the trial judge to have acted within his discretion in denying the severance mainly because the testimony Benz proffered, and contends he would have given, was not sufficiently important in the context of his trial to demonstrate clear prejudice. First, the records of his charter business were not important because the government never argued that Benz did not have a legitimate charter business. The government only contended that the Edgar Picado charter was a sham. That Benz ran a charter business was presented explicitly to the jury in Benz' cross-examination of Douglas Lee. That Benz ran such a business was also implicit in both the prosecution and defense theories of the case. Since the legitimacy of the business in general was not challenged, the business records were not needed to provide such legitimacy. Second the notion that Benz had chartered the *Capre Diem* to Picado from September to December 1981 and that Benz had no idea the boat was being used for illicit purposes was before the jury in the form of his verified Petition for Remission or Mitigation of Forfeiture. While Benz' attorney did not stress this point forcefully to the jury, the evidence before the jury would have given him ample license to do so.

In *United States v. Outler*, 659 F.2d 1306 (5th Cir. Unit B 1981), *cert. denied*, 455 U.S. 950, 102 S.Ct. 1453, 71 L.Ed.2d 665 (1982),[13] as here, the facts to which the defendant would have testified if he had been granted a severance of counts, were presented to the jury through other testimony. Accordingly, the predecessor to this court found no clear prejudice to the defendant's case in the trial court's denial of his motion for a severance. Similarly, we find that Benz' statement in support of his Petition for Remission or Mitigation of Forfeiture presented to the jury the facts to which he would have testified. The district court did not abuse its discretion in refusing to sever the two counts of the indictment.

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[13]In *Stein v. Reynolds Securities, Inc.*, 667 F.2d 33 (11th Cir.1982), this court adopted as binding precedent all decisions of Unit B of the former Fifth Circuit handed down after September 30, 1981.

C.

At the close of all the evidence, the district court granted Miller a mistrial. The court did so because it had prevented Miller from calling Benz' trial attorney as a witness in her defense. The court thereafter refused Benz' request that the jury be instructed to disregard Miller's testimony in considering the government's case against Benz. Benz claims that this ruling caused him substantial prejudice, because his and Miller's defenses had been inconsistent; accordingly, he is entitled to a new trial. For purposes of analysis, we treat Benz' claim as discrete attacks on two of the district court's rulings: its denial of Benz' pretrial motion to sever this case from Miller's, and its refusal to instruct the jury to disregard her testimony.

The court denied Benz' pretrial motion for a severance of parties because it was satisfied that Benz would not be prejudiced by being tried with Miller. That determination was well within the court's discretion. Interests of judicial economy generally counsel that coconspirators be tried jointly; we reverse a trial judge's denial of a motion to sever only when the appellant can demonstrate that the denial caused hm "compelling prejudice." *United States v. Marszalkowski*, 669 F.2d 655, 660 (11th Cir.), *cert. denied sub nom. Brock v. United States*, 459 U.S. 906, 103 S.Ct. 208, 74 L.Ed.2d (167) (1982). "Compelling prejudice" means that the jury will not be able to "collate and appraise the independent evidence against each defendant. . . [T]hough the task be difficult [unless the jury cannot perform it] severance should not be granted." *Tillman v. United States*, 406 F.2d 930, 935 (5th Cir.), *vacated in part on other grounds*, 395 U.S. 830, 89 S.Ct. 2143, 23 L.Ed.2d 742 (1969). With this standard in mind, we assess the reasonableness of the trial judge's exercise of discretion when he denied Benz' pretrial motion to sever the parties.

At the time the judge considered the motion there was no indication that a joint trial would cause Benz to suffer compelling prejudice. Nothing Benz presented in support of his motion suggested, for example, that his defense would be at odds with Miller's. He should have expected the court to deny his motion, and the court properly did so.

That the denial of a pretrial motion for a severance may

have been proper does not necessarily end the severance matter, however. The judge may be obliged to reconsider his ruling at trial; the parties' defenses may become irreconcilable and the defendant may request a severance of his case and the declaration of a mistrial. In the situation before us, the defendant, Benz, never moved for a mistrial; he simply requested the court to strike Miller's testimony and to give the jury an accompanying prophylactic instruction. Implicit in this request was the representation to the court that he had not incurred the sort of compelling prejudice required for a mistrial and that the court's counselling of the jury would satisfactorily alleviate any improper prejudice that may have occurred as a result of the joint trial.[14]

We will assume, however, for the sake of discussion, that Benz moved for a mistrial on the ground that Miller's defense had so conflicted with his defense as to deny him a fair trial and that the court denied his motion, concluding that the parties defenses had not "conflict[ed] to the point of being irreconcilable and mutually exclusive." *United States v. Crawford*, 581 F.2d 489, 491 (5th Cir.1978). The record amply supports such a conclusion.

The potential for conflict first arose when Miller took the stand in her defense. (Benz' defense had previously rested.) But no conflict materialized. Miller testified that she had signed the Picado charter agreement while she was meeting with Benz' secretary, Debra Engh, for another purpose. Engh told Miller that the original agreement had been stolen. She asked Miller to sign Picado's name to a replacement and produced a form agreement for that purpose. Miller, thinking Picado had actually chartered the *Carpe Diem* because her boyfriend Ed Cowart had previously told her Picado had the boat, accommodated Engh and signed the form. At the time she signed it, she testified, Benz' signature was not on the document.

This testimony was perfectly reconcilable with the various scenarios Benz presented to the jury: that he thought Picado had the boat and thought the charter agreement submitted to Customs was genuine; that he thought Hunt had the boat; that he thought Cowart had the boat; that in any event Benz never had

[14]The trial judge properly kept the fugitive status of Benz' and Miller's codefendants from the knowledge of the jury.

the boat while the alleged conspiracy was in progress and knew nothing of the conspiracy. Miller never claimed that Engh was acting for Benz when Engh asked her to place the name Edgar Picado on the form. The jury had they believed Benz and Miller, could have determined that the entire smuggling operation was coordinated by Cowart, Engh, and Engh's boyfriend, Maros, without Benz', or Miller's, knowledge or consent. Benz thus fails to show that Miller's testimony produced a trial of "irreconcilable and mutually exclusive" defenses, the sort of "compelling prejudice" that would mandate the declaration of a mistrial had Benz requested such relief.

Since the court has never required to grant a severance or, after the jury was sworn, a mistrial, the question becomes simply whether the trial judge should have stricken Miller's testimony from the record and instructed the jury to disregard it. In answering this question, we inquire, first, whether Miller's testimony was relevant to any material issue in Benz' case. If it was, it was admissible. See Fed.R.Evid. 402. Miller's testimony was plainly relevant to both counts. It yielded inferences that Benz engineered the forgery of the charter agreement in its assertions that Benz' secretary, Debra Engh, got Miller to forge Picado's name. It also confirmed the stipulated falsity of the agreement. Regarding count one, the testimony tended to corroborate parts of Hunt's testimony.

In arguing that the trial judge should have stricken Miller's testimony, Benz does not contend that the testimony was irrelevant, or if relevant that it shoudl have been excluded because "its probative value [was] substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." Fed.R. Evid. 403. His argument is, simply, that the testimony should have been stricken because it would not have been forthcoming had he been tried separately. His argument is specious. If this argument is given currency, it is one which will surface in every multiple defendant trial after a codefendant has been dismissed. We could not countenance a rule which holds that the district court, after the dismissal of a codefendant, must strike wholly relevant, probative evidence from the record merely because it was introduced by the codefendant rather than the government. Moreover, the result is no different than if Miller had been acquitted or granted post-conviction relief.

In sum, the trial judge properly denied Benz' pretrial motion for a severance of parties. He also ruled correctly in refusing to strike Miller's testimony. The testimony was plainly relevant. Moreover, the judge's general charge to the jury certainly enabled the jury to collate and appraise the individual evidence against Benz. *Tillman*, 406 F.2d at 935.

D.

Benz contends that the government should have produced for his impeachment of Hunt certain DEA-issued receipts showing that Hunt obtained money from the DEA for "purchase of information." Benz argues that he was entitled to these statements under his general pretrial discovery request, the rules of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and Jencks Act, 18 U.S.C. § 3500 (1982), and Fed.R.Crim.P. 16.

We first note that Benz has no Jencks Act claim because he did not make a proper Jencks Act motion for the production of Hunt's statements following the prosecutor's direct examination of Hunt. *See United States v. Liuzzo*, 739 F.2d 541, at 544 (11th Cir.1984); *United States v. Gatto*, 533 F.2d 264, 265 (5th Cir.1976); 2 C. Wright, *Federal Practice and Procedure: Criminal 2d* § 438. Nor does Benz present a Rule 16 claim because that rule incorporates the limitations of the Jencks Act on discovery of government witness statements. Fed.R.Crim.P. 16(a)(2). Benz' *Brady* claim presents a slightly more substantial question.

Brady asserts that the "suppression by the prosecution of evidence favorable to the accused upon request violates due process where the evidence is material either to guilt or to punishment." *Brady*, 373 U.S. at 87, 83 S.Ct. at 1196, 1197. The former Fifth Circuit addressed extensively the application of *Brady* in *United States v. Anderson*, 574 F.2d 1347 (5th Cir.1978). The court described the four distinct categories of *Brady* problems:

> (1) the prosecutor has not disclosed information despite a specific defense request; (2) the prosecutor has not disclosed information despite a general defense request for all exculpatory information or without any defense request at all; (3) the prosecutor knows or should know that the con-

> viction is based on false evidence. . . [4] the prosecutor fails to disclose purely impeaching evidence not concerning a substantive issue, in the absence of a specific defense request.

Id. at 1353. The court went on to note that each category required the application of a distinct test in order to assess whether the defendant's due process right to a fair trial had been violated.

Benz' pretrial motion for discovery of any evidence impeaching coconspirators' statements made in the course and furtherance of the conspiracy was not a sufficiently specific request for the DEA receipts to fall under the first category. See *id.* at 1351, 1354 (motion requesting "[t]he recorded testimony of any codefendant . . . before the grand jury . . . which relates to the offense charged" and "[a]ll books, papers, documents . . . material to the defense" not sufficiently specific to warrant application of first category standard of review to nondisclosure of FBI witness interview report). The situation certainly does not fall under the third category; it does not involve perjured testimony. Accordingly, the DEA receipts could be analyzed under the second or fourth category. We apply the test for the second category because it incorporates a lower standard of materiality, i.e., that reversal is required if the omitted evidence creates a reasonable doubt that did not otherwise exist, than does the fourth category, which would require reversal only if the undisclosed evidence would probably have resulted in an acquittal. *Id.* at 1354.

Even applying the former standard to the facts of this case, we find no *Brady* violation. The standard DEA form receipts would have provided some additional support for the stringent cross-examination Benz' counsel conducted of Hunt and DEA Agent Haines regarding the payments, because they indicated that the purpose of the payments was a "purchase of information," presumably about drug smuggling, including the activities of the defendants in this case. However, Benz' counsel delved thoroughly and extensively into the amounts and nature of the payments, and argued them to the jury as Hunt's "license to lie." Agent Haines and Hunt readily admitted the payments, though they stated that the money was for subsistence and expenses. Had the evidence come in, the term "purchase of infor-

mation" on the standard form receipt would likely have been explained as a usual administrative classification of witness payments. The evidence of the payments was sufficiently presented to the jury, and the receipts would not have created a reasonable doubt that did not otherwise exist.

E.

Benz complains that Hunt gave a nonresponsive answer to one of his questions on cross-examination which prejudiced him sufficiently to warrant reversal of his convictions. Benz' counsel objected to Hunt's answer, and the judge immediately instructed the jury to disregard it. The colloquy was as follows:

> Q Okay. And when can you tell this jury you actually [started your own sail-making business?]
>
> A I can't exactly say the date.
>
> Q September of '81 is when you have testified you went on the *Carpe Diem;* it was prior to that?
>
> A It was the same month—if I could find my records, and he has them, it was the same month that I made sails for him to take his boat[18] down with—my partner, Stretch Sterrett, take his boat down to Columbia with Carl and Tom something, to go and pick up a load. And that's when the business went bankrupt.

After a sidebar conference at which Benz' counsel moved for a mistrial, the court instructed the jury:

> THE COURT: Ladies and gentlemen, the answer that this witness just gave in response to that last question is being stricken by the Court. It is stricken as not being responsive to the question.
>
> So, having stricken it, you are now instructed to disregard it in any way in your deliberations over the guilt or innocence of either of these defendants in this case.

The general rule in this circuit is that, if the trial judge strikes erroneously admitted evidence from the record with an

[18]The record does not indicate for whom Hunt made the sails or the identity of the boat. Moreover,the prosecutor, in his closing argument to the jury, made no suggestion that Hunt was referring to Benz and the *Carpe Diem*.

instruction that the jury disregard it, the error is cured unless the evidence is so highly prejudicial as to render the error incurable. *United States v. Slocum*, 708 F.2d 587, 598 (11th Cir.1983). We do not find Hunt's slip to have been so highly prejudicial as to render the error incurable.

F.

Benz' final point is that the court erred in refusing to admit the "Picado letter" into evidence. He raises this point only in his reply brief. Arguments raised for the first time in a reply brief are not properly before the reviewing court. *Knighten v. Commissioner of Internal Revenue*, 702 F.2d 59, 60 (5th Cir.), *cert. denied*, ____ U.S. ____, 104 S.Ct. 249, 78 L.Ed.2d 237 (1983); *Bugg v. International Union of Allied Industrial Workers of America*, 674 F.2d 595, 598 (7th Cir.1982), *cert. denied*, 459 U.S. 805, 103 S.Ct.29, 74 L.Ed.2d 43 (1983); *United States v. Ewing*, 445 F.2d 945, 949 n. 8 (10th Cir.1971) *vacated on other grounds*, 413 U.S. 913, 93 S.Ct. 3031, 37 L.Ed.2d 1022 (1973); *see* 16 C. Wright, A. Miller, E. Cooper & E. Gressman, *Federal Practice and Procedure* § 3974, at 428 (1977). Accordingly, we do not address this argument.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
FILED
FEB 19 1985
SPENCER D. MERCER
CLERK

No. 83-3168

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

AUGUST CARL BENZ,

Defendant-Appellant.

Appeal from the United States District Court for the Middle District of Florida

---

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion September 4, 1984, 11 Cir., 1984, _____ F.2d _____).

(FEB 19 1985)

Before GODBOLD, Chief Judge, TJOFLAT and HENDERSON, Circuit Judges.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular

active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

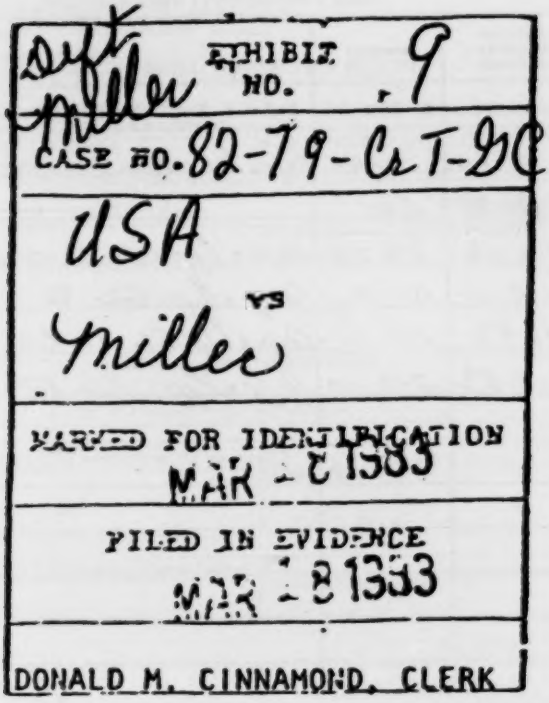
ENTERED FOR THE COURT:

/s/ Tjoflat
United States Circuit Judge

EDITOR'S NOTE

PAGES C-1 thru C-11 WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

APPENDIX C


Deft
Miller
EXHIBIT NO. 9
CASE NO. 82-79-Cr T-DC
USA
VS
Miller
MARKED FOR IDENTIFICATION
MAR - 8 1983
FILED IN EVIDENCE
MAR - 8 1983
DONALD M. CINNAMOND, CLERK

CASE / INFORMANT COST RECORD			CASE / INFORMANT NO. SG6-82-0004
DATE OF PAYMENT / EXPENSE	AMOUNT	DESCRIPTION OF EXPENDITURE	EXPENDED (Last Name)
9/16/82	$ 200.00	Info & Exp. re G6-82-0013	Smith
9-21-82	$ 300.00	Info + Exp; G6-82-0013	Smith
~~9-23-82~~	~~50~~		
11-1-82	250.00	Info + Exp G6-82-0013	Smith
11-19-82	100.00	Info + Exp. G6-82-0013	Smith
2-18-83	250.00	Info + Exp G6-82-0013	Smith
3-9-83	250.00	Info + Exp. G6-82-0013	Smith
	$1150.00		

Released by USDA
To Defendant's Attorney
Only
Pursuant To 18 USC 3500

DEA Form – 356

Previous Edition dated 2/74 is OBSOLETE

DEPARTMENT OF THE TREASURY
UNITED STATES CUSTOMS SERVICE

PURCHASE OF INFORMATION/EVIDENCE TRANSACTION RECEIPT

4300, P&PM

PART 1 - REQUEST FOR PAYMENT

1. PAYMENT FOR PURCHASE OF	2. CASE NUMBER INVOLVED	3. DATE REQUEST INITIATED
[X] INFORMATION [ ] EVIDENCE	TAMPA C 243 001	08/12/82

4. AMOUNT OF PAYMENT REQUESTED (Write Out): Twelve Hundred and Sixty Five and 00/100 — $ 1665.00

5. CONFIDENTIAL SOURCE ASSIGNED/TRUE NAME	6. CONFIDENTIAL SOURCE NUMBER
John P. Hunt	S-86TA

7. REASON FOR PAYMENT: Purchase of Information

8. TITLE OF OFFICER REQUESTING PAYMENT	9. REQUESTING OFFICER'S SIGNATURE
Special Agent	Alfred B. Haines

PART 2 - SUPERVISORY APPROVAL OF PAYMENT

10. TITLE AND SIGNATURE OF APPROVING SUPERVISOR	11. DATE OF APPROVAL
[illegible] SAC	08 11 82

PART 3 - RECEIPT OF FUNDS FROM CASHIER*

12. NAME AND DESIGNATION OF CASHIER	13. DATE FUNDS RECEIVED
Lavia Shriman [illegible]	08/12/82

14. AMOUNT OF FUNDS ADVANCED (Write Out): ONE THOUSAND and 00/100 — $ 1000.00

15. TITLE AND SIGNATURE OF OFFICER RECEIVING FUNDS: Special Agent Alfred B. Haines

*CASHIER NOTE: After Parts 1, 2, and 3 have been completed and signed, detach last copy and retain it as a temporary imprest fund receipt until the transaction is completed.

PART 4 - PAYMENT TO CONFIDENTIAL SOURCE

(NOTE: All copies of Part 4 must have original signatures.)

Received of Alfred B. Haines Special Agent (Name and title of officer making payment) a sum in the amount of one Thousand and 00/100 (Write out figure amount) dollars $ 1000.00

on 08/12/82 (Date) at St. Petersburg Beach, Florida (City and State) for information/evidence of violation(s) of laws enforced by the U.S. Customs Service. I have been advised and understand that the payment received constitutes taxable income under the provisions of the Internal Revenue Service laws of the United States.

[signature] (Confidential Source Assigned/True Name)

Witnessed: [signature] (Signature and Title of Witness)

Witnessed: [signature] SA (Signature and Title of Witness)

DISTRIBUTION: 1(White): IMPREST FUND 2(Green): IMPREST FUND 3(Yellow): SOURCE FILE 4(Pink): SOURCE 5(Blue): TEMP. RECEI

Customs Form 293 (09228

DEPARTMENT OF THE TREASURY
UNITED STATES CUSTOMS SERVICE

PURCHASE OF INFORMATION/EVIDENCE TRANSACTION RECEIPT

4200, P&PM

PART 1 - REQUEST FOR PAYMENT

1. PAYMENT FOR PURCHASE OF	2. CASE NUMBER INVOLVED	3. DATE REQUEST INITIATED
☐ INFORMATION ☐ EVIDENCE	[illegible]243001	11/26/82

4. AMOUNT OF PAYMENT REQUESTED (Write Out)
one thousand, two hundred & twenty-four and 00/100 —— $ 1224.00

5. CONFIDENTIAL SOURCE ASSUMED/TRUE NAME	6. CONFIDENTIAL SOURCE NUMBER
Gil P. Hunt, III	S-[illegible]

7. REASON FOR PAYMENT

Purchase of Information

8. TITLE OF OFFICER REQUESTING PAYMENT	9. REQUESTING OFFICER'S SIGNATURE
Special Agent	[signature]

PART 2 - SUPERVISORY APPROVAL OF PAYMENT

10. TYPE AND SIGNATURE OF APPROVING SUPERVISOR	11. DATE OF APPROVAL
[signature] SAC	12 of 82

PART 3 - RECEIPT OF FUNDS FROM CASHIER*

12. NAME AND DESIGNATION OF CASHIER	13. DATE FUNDS RECEIVED
Rosalind Rodish, Subcashier	12 of 82

14. AMOUNT OF FUNDS ADVANCED (Write Out)
two thousand and 00/100 —— $ 1000.00

15. TYPE AND SIGNATURE OF OFFICER RECEIVING FUNDS	*CASHIER NOTE: After Parts 1, 2, and 3 have been completed and signed, detach last copy and retain it as a temporary imprest fund receipt until the transaction is completed.
[signature]	

PART 4 - PAYMENT TO CONFIDENTIAL SOURCE
(NOTE: All copies of Part 4 must have original signatures.)

Received of [illegible] (Name and title of officer making payment) a sum in the amount of [illegible] (Write out figure amount) dollars $ 1000.00

on [illegible] (Date) at Clearwater, Florida (City and State) for information/evidence of violation of laws enforced by the U.S. Customs Service. I have been advised and understand that the payment received constitutes taxable income under the provisions of the Internal Revenue Service laws of the United States.

[signature] (Confidential Source Assumed/True Name)

Witnessed: [signature] (Signature and Title of Witness)

Witnessed: [signature] (Signature and Title of Witness)

DISTRIBUTION: 1(White): IMPREST FUND 2(Green): IMPREST FUND 3(Yellow): SOURCE FILE 4(Pink): SOURCE 5(Goldenrod): TEMP. RECE

Customs Form 293 (09228

DEPARTMENT OF THE TREASURY
UNITED STATES CUSTOMS SERVICE

$6,050

PURCHASE OF INFORMATION/EVIDENCE TRANSACTION RECEIPT

4700, P&PM

PART 1 - REQUEST FOR PAYMENT

1. PAYMENT FOR PURCHASE OF	2. CASE NUMBER INVOLVED	3. DATE REQUEST INITIATED
[X] INFORMATION [ ] EVIDENCE	TAR2CR343C04	02/08/83

4. AMOUNT OF PAYMENT REQUESTED (Write Out) — ($ 200.00)

5. CONFIDENTIAL SOURCE ASSUMED/TRUE NAME	6. CONFIDENTIAL SOURCE NUMBER
T. B. P. Hunt III	SA 6TA

7. REASON FOR PAYMENT

Purchase of information

8. TITLE OF OFFICER REQUESTING PAYMENT	9. REQUESTING OFFICER'S SIGNATURE
Special Agent	T. B. P. Hunt

PART 2 - SUPERVISORY APPROVAL OF PAYMENT

10. TITLE AND SIGNATURE OF APPROVING SUPERVISOR	11. DATE OF APPROVAL
[illegible] SAC	2-4-83

PART 3 - RECEIPT OF FUNDS FROM CASHIER*

12. NAME AND DESIGNATION OF CASHIER	13. DATE FUNDS RECEIVED
[illegible]	[illegible]

14. AMOUNT OF FUNDS ADVANCED (Write Out) — ($ [illegible])

15. TITLE AND SIGNATURE OF OFFICER RECEIVING FUNDS

*CASHIER NOTE: After Parts 1, 2, and 3 have been completed and signed, detach last copy and retain it as a temporary imprest fund receipt until the transaction is completed.

PART 4 - PAYMENT TO CONFIDENTIAL SOURCE

(NOTE: All copies of Part 4 must have original signatures.)

Received of Ass't R. Hunt, Special Agent (Name and title of officer making payment) a sum in the amount of Two Hundred 00/100 (write out figure amount) dollars ($ 200.00)

on February 11 1983 (Date) at Lancaster, Florida (City and State) for information/evidence of violation(s) of laws enforced by the U.S. Customs Service. I have been advised and understand that the payment received constitutes taxable income under the provisions of the Internal Revenue Service laws of the United States.

T. B. P. Hunt III
(Confidential Source Assumed/True Name)

Witnessed: [illegible] SA
(Signature and Title of Witness)

Witnessed: [illegible] SA
(Signature and Title of Witness)

DISTRIBUTION: 1(White): IMPREST FUND 2(Green): IMPREST FUND 3(Yellow): SOURCE FILE 4(Pink): SOURCE 5(Blue): TEMP. RECE

Customs Form 293 (09228

DEPARTMENT OF THE TREASURY
UNITED STATES CUSTOMS SERVICE

PURCHASE OF INFORMATION/EVIDENCE TRANSACTION RECEIPT

4290, P&PM

PART 1 - REQUEST FOR PAYMENT

1. PAYMENT FOR PURCHASE OF	2. CASE NUMBER INVOLVED	3. DATE REQUEST INITIATED
[X] INFORMATION [ ] EVIDENCE	TAO2CR343004	03 02 83

4. AMOUNT OF PAYMENT REQUESTED (Write Out): Two Hundred and Fifty (00/100) ——— $250.00

5. CONFIDENTIAL SOURCE ASSUMED/TRUE NAME	6. CONFIDENTIAL SOURCE NUMBER
John P. Hunt, III	S-AE6TA

7. REASON FOR PAYMENT

Purchase of Information and Subscription

8. TITLE OF OFFICER REQUESTING PAYMENT	9. REQUESTING OFFICER'S SIGNATURE
Special Agent	Special Agent B. Haines

PART 2 - SUPERVISORY APPROVAL OF PAYMENT

10. TITLE AND SIGNATURE OF APPROVING SUPERVISOR	11. DATE OF APPROVAL
SAC	3-8-83

PART 3 - RECEIPT OF FUNDS FROM CASHIER*

12. NAME AND DESIGNATION OF CASHIER	13. DATE FUNDS RECEIVED
	3-9-83

14. AMOUNT OF FUNDS ADVANCED (Write Out): Two Hundred and Fifty (00/100) ——— $250.00

15. TITLE AND SIGNATURE OF OFFICER RECEIVING FUNDS	*CASHIER NOTE: After Parts 1, 2, and 3 have been completed and signed, detach last copy and retain it as a temporary imprest fund receipt until the transaction is completed.
Special Agent Special Agent B. Haines	

PART 4 - PAYMENT TO CONFIDENTIAL SOURCE

(NOTE: All copies of Part 4 must have original signatures.)

Received of Special Agent B. Haines (Name and title of officer making payment) a sum in the amount of Two Hundred and Fifty (Write out figure amount) dollars $250.00

on 03/09/83 (Date) at Clearwater, Florida (City and State) for information/evidence of violation(s) of laws enforced by the U.S. Customs Service. I have been advised and understand that the payment received constitutes taxable income under the provisions of the Internal Revenue Service laws of the United States.

[signature] (Confidential Source Assumed/True Name)

Witnessed: Special Agent B. Haines SA (Signature and Title of Witness)

Witnessed: [signature] SA (Signature and Title of Witness)

DISTRIBUTION: 1(White): IMPREST FUND 2(Green): IMPREST FUND 3(Yellow): SOURCE FILE 4(Pink): SOURCE 5(Blue): TEMP. RECEI

Customs Form 293 (09227

DEPARTMENT OF THE TREASURY
UNITED STATES CUSTOMS SERVICE

PURCHASE OF INFORMATION/EVIDENCE TRANSACTION RECEIPT

4700, PAPM

PART 1 - REQUEST FOR PAYMENT

1. PAYMENT FOR PURCHASE OF	2. CASE NUMBER INVOLVED	3. DATE REQUEST INITIATED
☐ INFORMATION ☐ EVIDENCE	TM07C243001	11/16/92

4. AMOUNT OF PAYMENT REQUESTED (Write Out)
Eighteen hundred & twenty-four and 00/100 ---------- $ 1824.00

5. CONFIDENTIAL SOURCE ASSUMED/TRUE NAME	6. CONFIDENTIAL SOURCE NUMBER
John P. Hunt, III	S-7967

7. REASON FOR PAYMENT

Purchase of information

8. TITLE OF OFFICER REQUESTING PAYMENT	9. REQUESTING OFFICER'S SIGNATURE
Special Agent	J. P. Hunt

PART 2 - SUPERVISORY APPROVAL OF PAYMENT

10. TITLE AND SIGNATURE OF APPROVING SUPERVISOR	11. DATE OF APPROVAL

PART 3 - RECEIPT OF FUNDS FROM CASHIER*

12. NAME AND DESIGNATION OF CASHIER	13. DATE FUNDS RECEIVED
Rosalind Yolish, Subcashier	11/20/92

14. AMOUNT OF FUNDS ADVANCED (Write Out)
eight hundred, twenty-four and 00/100 ---------- $ 824.00

15. TITLE AND SIGNATURE OF OFFICER RECEIVING FUNDS	*CASHIER NOTE: After Parts 1, 2, and 3 have been completed and signed, detach last copy and retain it as a temporary imprest fund receipt until the transaction is completed.
Rosalind Yolish Subcashier	

PART 4 - PAYMENT TO CONFIDENTIAL SOURCE

(NOTE: All copies of Part 4 must have original signatures.)

Received of Special Agent John P. Hunt, III a sum in the amount of
(Name and title of officer making payment)

Eight hundred Twenty-four and 00/100 dollars $ 824.00
(Write out figure amount)

on 11-20-92 at Tampa, Florida for information/evidence of violation of laws enforced by the U.S. Customs Service. I have been advised and understand that the payment received constitutes taxable income under the provisions of the Internal Revenue Service laws of the United States.
(Date) (City and State)

John P. Hunt, III
(Confidential Source Assumed/True Name)

Witnessed: John J. Kelly, Special Agent
(Signature and Title of Witness)

Witnessed: [illegible] Special Agent 131
(Signature and Title of Witness)

DISTRIBUTION: 1(White): IMPREST FUND 2(Green): IMPREST FUND 3(Yellow): SOURCE FILE 4(Pink): SOURCE 5(Goldenrod): TEMP. RECEI

Customs Form 293 (09228)

DEPARTMENT OF THE TREASURY
UNITED STATES CUSTOMS SERVICE

PURCHASE OF INFORMATION/EVIDENCE TRANSACTION RECEIPT

4300, PAPM

PART 1 - REQUEST FOR PAYMENT

1. PAYMENT FOR PURCHASE OF	2. CASE NUMBER INVOLVED	3. DATE REQUEST INITIATED
[X] INFORMATION [ ] EVIDENCE	TA71XC213001	09 08 82

4. AMOUNT OF PAYMENT REQUESTED (Write Out): Two Hundred and 00/100 — $ 200.00

5. CONFIDENTIAL SOURCE ASSIGNED/TRUE NAME	6. CONFIDENTIAL SOURCE NUMBER
Toby Philip Hunt	S-86TA

7. REASON FOR PAYMENT: Purchase of Information in regards to T. 46 21 violations

8. TITLE OF OFFICER REQUESTING PAYMENT	9. REQUESTING OFFICER'S SIGNATURE
Special Agent	A.B. Haines

PART 2 - SUPERVISORY APPROVAL OF PAYMENT

10. TITLE AND SIGNATURE OF APPROVING SUPERVISOR	11. DATE OF APPROVAL
T.G. Gill SAC	09 10 82

PART 3 - RECEIPT OF FUNDS FROM CASHIER*

12. NAME AND DESIGNATION OF CASHIER	13. DATE FUNDS RECEIVED
Laura A. Shipman	09 10 82

14. AMOUNT OF FUNDS ADVANCED (Write Out): Two Hundred and 00/100 — $ 200.00

15. TITLE AND SIGNATURE OF OFFICER RECEIVING FUNDS: Special Agt. A.B. Haines

*CASHIER NOTE: After Parts 1, 2, and 3 have been completed and signed, detach last copy and retain it as a temporary imprest fu receipt until the transaction is completed.

PART 4 - PAYMENT TO CONFIDENTIAL SOURCE

(NOTE: All copies of Part 4 must have original signatures.)

Received of Alfred B. Haines, Special Agent (Name and title of officer making payment) a sum in the amount of Two Hundred and 00/100 (Write out figure amount) dollars ($ 200.00)

on 091582 (Date) at Tampa (City and State) for information/evidence of v-

lation(s) of laws enforced by the U.S. Customs Service. I have been advised and understand that the payment received consti tutes taxable income under the provisions of the Internal Revenue Service laws of the United States.

(Confidential Source Assigned/True Name)

Witnessed: (Signature and Title of Witness)

Witnessed: (Signature and Title of Witness)

DISTRIBUTION: 1(white): IMPREST FUND 2(Green): IMPREST FUND 3(Yellow): SOURCE FILE 4(Pink): SOURCE 5(Blue): TEMP. R

Customs Form 293 (09)

DEPARTMENT OF THE TREASURY
UNITED STATES CUSTOMS SERVICE

PURCHASE OF INFORMATION/EVIDENCE TRANSACTION RECEIPT

4200. P&PM

PART 1 - REQUEST FOR PAYMENT

1. PAYMENT FOR PURCHASE OF ☐ INFORMATION ☐ EVIDENCE
2. CASE NUMBER INVOLVED: TA07XC243001
3. DATE REQUEST INITIATED: 8/12/82
4. AMOUNT OF PAYMENT REQUESTED (Write Out): Six Hundred and Sixty Five Dollars ($ **665.00**)
5. CONFIDENTIAL SOURCE ASSUMED/TRUE NAME: John P. Hunt
6. CONFIDENTIAL SOURCE NUMBER: S-06-TA
7. REASON FOR PAYMENT: Payment for Information
8. TITLE OF OFFICER REQUESTING PAYMENT: Special Agent
9. REQUESTING OFFICER'S SIGNATURE:

PART 2 - SUPERVISORY APPROVAL OF PAYMENT

10. TITLE AND SIGNATURE OF APPROVING SUPERVISOR: T.J.S. O'Brien, Special Agent in Charge for RDI/III
11. DATE OF APPROVAL: 081282

PART 3 - RECEIPT OF FUNDS FROM CASHIER*

12. NAME AND DESIGNATION OF CASHIER: Laura Sherman, Sub-Cashier
13. DATE FUNDS RECEIVED: 8/18/82
14. AMOUNT OF FUNDS ADVANCED (Write Out): Six Hundred Sixty-Five Dollars ($ ***665.00***)
15. TITLE AND SIGNATURE OF OFFICER RECEIVING FUNDS: Cashier's check sent to SAC/Boston Al Frare 8/18/82

*CASHIER NOTE: After Parts 1, 2, and 3 have been completed and signed, detach last copy and retain it as a temporary imprest fund receipt until the transaction is completed.

PART 4 - PAYMENT TO CONFIDENTIAL SOURCE

(NOTE: All copies of Part 4 must have original signatures.)

Received of U.S. Customs Special Agent Patricia A. Larkin (Name and title of officer making payment) a sum in the amount of SIX HUNDRED AND SIXTY-FIVE DOLLARS (Write out figure amount) dollars ($ 665.00)

on Aug 23 1982 (Date) at BOSTON, MASSACHUSETTS (City and State) for information/evidence of violation(s) of laws enforced by the U.S. Customs Service. I have been advised and understand that the payment received constitutes taxable income under the provisions of the Internal Revenue Service laws of the United States.

John P. Hunt
(Confidential Source Assumed/True Name)

Witnessed: Patricia A. Larkin Special Agent
(Signature and Title of Witness)

Witnessed:
(Signature and Title of Witness)

DISTRIBUTION: 1(White): IMPREST FUND 2(Green): IMPREST FUND 3(Yellow): SOURCE FILE 4(Pink): SOURCE 5(Gold): TEMP. FILE

Customs Form 293 (0832)

DEPARTMENT OF THE TREASURY
UNITED STATES CUSTOMS SERVICE

TRAVEL AUTHORIZATION

1. NAME OF TRAVELER (First, Middle, Last): Haines, Alfred B. — 265-60-1267
2. AUTHORIZATION NUMBER: 46059226
3. AUTHORIZ DATE: 8/12/82
4. TRAVELER'S ORGANIZATION: Regional Director (Investigations) Miami
Special Agent in Charge, Tampa, Florida
5. APPROPRIATION NUMBER: 2020602/433482
6. PURPOSE OF TRAVEL: S-86-TA
Transportation for protection of confidential informant awaiting grand jury appearance

7. ITINERARY (Point of Origin and Places to be visited)

Tampa, Florida to Boston, Massachusetts and return

8. MODE OF TRAVEL ("X" all applicable items)

a. Bureau Travel Authority

b. COMMERCIAL CARRIER
☐ Bus ☐ Rail Coach ☐ Rail Pullman ☒ Air Coach/Tourist ☐ Air First Class

c. PRIVATELY OWNED VEHICLE
☐ Auto ☐ Plane Rate Allowed Per Mile $ ____
☐ Determined More Advantageous To The Government ☐ For Traveler's Convenience

d. OTHER VEHICLE
☐ Government Owned or Leased Vehicle, Aircraft, or Vessel ☐ Privately Leased Vehicle, Aircraft or Vessel

e. OTHER (Specify)

9. AUTHORIZED SUBSISTENCE RATES
☐ Per Diem and/or ☐ Actual

10. ESTIMATES OF COSTS

Regular Expenses	Amount
a. Per Diem/ Actual Subsistence	
b. Transportation	411.00
c. Miscellaneous	
Special Expenses Authorized	**Amount**
d. Registration Fees (Meetings, Training, etc.)	
e. Taxi Fares Between Lodging and/or Place(s) of Business	
f. Excess Baggage Not to Exceed ____ Lbs.	
g. Other (Specify)	
h. TOTAL ESTIMATED COSTS	411.00

11. PERIOD OF TRAVEL: a. Begin on or About 8/12/82 — b. End on or About 9/15/82

12. FISCAL CERTIFICATION
Funds are available to defray travel costs specified above.

13. AUTHORIZATION AUTHENTICATION
The above named traveler is hereby authorized and directed to perform official travel at Government expense as indicated herein. Unless otherwise notified, all expenses for transportation and per diem, indicated above, are authorized in accordance with the Federal Travel Regulations as implemented by Treasury Department Regulations and the U.S. Customs Service Travel and Transportation Manual.

14. SPECIAL PROVISIONS/REMARKS

15. TITLE AND LOCATION (Signature)

Paul W. O'Brien, Special Agent in Charge, Tampa, Florida

GPO 912-481

Customs Form 4835 (10-11-74)

TRAVEL VOUCHER

(Read the Privacy Act Statement on the back)

1. DEPARTMENT, ESTABLISHMENT, BUREAU DIVISION OR OFFICE: Treasury, U.S. Customs Service Ofc of Investigations

2. TYPE OF TRAVEL: [X] TEMPORARY DUTY [ ] PERMANENT CHANGE OF STATION

3. VOUCHER NO.

4. SCHEDULE NO.

a. NAME (Last, first, middle initial): Haines, Alfred B.

b. SOCIAL SECURITY NO.: 265-60-1267

5. PERIOD OF TRAVEL: a. FROM 081282 b. TO 091582

c. MAILING ADDRESS (Include ZIP Code): P.O. Box 1516, Tampa, Florida 33601

d. OFFICE TELEPHONE NO.: 826-2171

7. TRAVEL AUTHORIZATION: a. NUMBER(S) 46059226 b. DATE(S) 8/12/82

e. PRESENT DUTY STATION: Tampa, Florida

f. RESIDENCE (City and State): Tampa, Florida

10. CHECK NO.

TRAVEL ADVANCE

Outstanding	
Amount to be applied	
Amount due Government (Attached [ ] Check [ ] Cash)	
Balance outstanding	

9. CASH PAYMENT RECEIPT

a. DATE RECEIVED

b. AMOUNT RECEIVED $

c. PAYEE'S SIGNATURE

11. PAID BY

12. GOVERNMENT TRANSPORTATION REQUESTS, OR TRANSPORTATION TICKETS, IF PURCHASED WITH CASH (List by number below and attach passenger coupon, if cash is used show claim on reverse side.)

I hereby assign to the United States any right I may have against any parties in connection with reimbursable transportation charges described below, purchased under cash payment procedures (FPMR 101-7) ▶ Traveler's Initials

AGENT'S VALUATION OF TICKET (a)	ISSUING CARRIER (Initials) (b)	MODE, CLASS OF SERVICE AND ACCOMMODATIONS (c)	DATE ISSUED (d)	POINTS OF TRAVEL FROM (e)	POINTS OF TRAVEL TO (f)
8,063,252	411.00	DL	coach	8/12/82	Tampa, FL	Boston, MA and return

S-86-TA

TR issued on behalf of confidential informant per approval of RDI/MI

I certify that this voucher is true and correct to the best of my knowledge and belief, and that payment or credit has not been received by me. Where applicable, per diem claimed is based on the average cost of lodging incurred during the period covered by this voucher.

TRAVELER SIGN HERE ▶ DATE 9/9/82 AMOUNT CLAIMED ▶ $ -0-

NOTE: Falsification of an item on an expense account works a forfeiture of claim (28 U.S.C. 2514) and may result in a fine of not more than $10,000 or imprisonment for not more than 5 years or both (18 U.S.C. 287, 18 1001).

This voucher is approved; long distance telephone calls, if any, are certified as necessary in the interest of the Government. (NOTE: If long distance telephone calls are included, the approving official must have been authorized in writing by the head of the department or agency to so certify (31 U.S.C. 680a).)

APPROVING OFFICIAL SIGN HERE ▶ DATE

17. FOR FINANCE OFFICE USE ONLY COMPUTATION

a. DIFFERENCES, IF ANY (Explain and show amounts)

b. TOTAL VERIFIED CORRECT FOR CHARGE TO APPROPRIATION (Certifier's initials) $

c. APPLIED TO TRAVEL ADVANCE (Appropriation symbol) $

d. NET TO TRAVELER ▶ $

c. LAST PRECEDING VOUCHER PAID UNDER SAME TRAVEL AUTHORIZATION

a. VOUCHER NO.	b. D.O. SYMBOL	c. MONTH & YEAR

e. THIS VOUCHER IS CERTIFIED CORRECT AND PROPER FOR PAYMENT

AUTHORIZED CERTIFYING OFFICIAL SIGN HERE ▶ DATE

18. ACCOUNTING CLASSIFICATION

2020602/433482

2012-116 NSN 7540-00-634-4180 STANDARD FORM 1012 (REV. 10-77) Prescribed by GSA, FPMR (41 CFR) 101-7

Office-Supreme Court, U.S.
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JUN 24 1985
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No. 84-1646

In the Supreme Court of the United States

OCTOBER TERM, 1984

AUGUST CARL BENZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Acting Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

THOMAS E. BOOTH
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

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QUESTIONS PRESENTED

1. Whether the government's failure to disclose vouchers reflecting payments to a witness was harmless error where government witnesses testified about the payments at trial.

2. Whether the trial court's instruction that the jury disregard the nonresponsive answer of a witness cured any prejudice from the witness's comment.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A19) is reported at 740 F.2d 903.

JURISDICTION

The judgment of the court of appeals was entered on September 4, 1984. A petition for rehearing was denied on February 19, 1985 (Pet. App. B1-B2). The petition for a writ of certiorari was filed on April 19, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Florida, petitioner was convicted on one count of conspiracy to import marijuana and to possess marijuana with intent to distribute, in violation of 21 U.S.C. 846 and 963, and on one count of submitting a

false statement, in violation of 18 U.S.C. 1001. He was sentenced to concurrent terms of imprisonment of five years on the conspiracy count and one year on the false statement count. The court of appeals affirmed (Pet. App. A1-A19).

The evidence at trial, as summarized by the court of appeals (Pet. App. A2-A5), is as follows: petitioner was a member of a drug smuggling conspiracy that imported thousands of pounds of marijuana from the Lesser Antilles to Florida aboard petitioner's sailboat. After the smugglers had unloaded the marijuana, they left the boat in waters off the Florida coast. Customs officers later discovered the abandoned boat and, upon finding marijuana residue on its deck, seized the vessel. After petitioner was notified of the seizure, he moved for remission or mitigation of the forfeiture, falsely contending that the boat had been chartered to "Edgar Picado" at the time of the seizure. In fact, co-conspirator Laurie Miller had forged the signature of "Edgar Picado" on the charter agreement.

ARGUMENT

1. Petitioner contends (Pet. 14-23) that, despite his request for discovery, the government withheld exculpatory evidence. This contention lacks merit.

The prosecution's response to petitioner's general pretrial request for discovery did not include production of certain receipts issued by the Drug Enforcement Administration (DEA). During the trial, however, Jim Hunt, an accomplice, and DEA Agent Haines, both testifying for the government, acknowledged on cross-examination that the DEA had made payments to Hunt for subsistence and expenses (Pet. App. A17). Petitioner never asked for production of the receipts reflecting those payments, but his counsel "delved thoroughly and extensively into the amounts and nature of the payments, and argued them to the jury as Hunt's 'license to lie.' " *Ibid.* After trial, petitioner obtained copies of the DEA receipts when they were

provided to a co-conspirator. The receipts are preprinted with the term "purchase of information/evidence transaction" across the top and they indicate that DEA paid Hunt for "information." Pet. App. A16-A18; *id.* at C3-C9. Petitioner contends that he was entitled to obtain these receipts for use at trial.

When a defendant makes a general request for exculpatory material and the material is not provided, he is not entitled to a new trial unless the material creates a reasonable doubt that did not otherwise exist. *United States* v. *Agurs,* 427 U.S. 97, 112 (1976). That is precisely the standard the court of appeals employed (Pet. App. A17) in concluding that the DEA receipts would not have created a reasonable doubt of petitioner's guilt. Thus, the petition involves the application of settled principles of law to the particular facts of this case.

In any event, the substance of the vouchers—the DEA payments to Hunt—was explored at length during the trial. It is true that the witnesses characterized the payments as expenses while the forms described them as payment for information, but as the court of appeals noted (Pet. App. A17-A18), the term "purchase of information" on the standard receipt form "would likely have been explained as a usual administrative classification of witness payments." Indeed, the government would hardly use a preprinted term on the receipt that carried the sinister connotation that petitioner ascribes to it. When viewed in the context of the evidence of petitioner's guilt, the court of appeals was plainly correct in holding that the omission of the receipts—which would have added nothing material to the evidence already before the jury—did not create a reasonable doubt. See, *e.g., United States* v. *Farid,* 733 F.2d 1318, 1320-1321

(8th Cir. 1984); *United States* v. *Sperling*, 726 F.2d 69, 72 (2d Cir. 1984), cert. denied, No. 83-1828 (June 11, 1984).[1]

2. Petitioner also contends (Pet. 24-26) that a nonresponsive answer by a witness was prejudicial and that the court's instruction to the jury to disregard the comment was an inadequate cure. This contention lacks merit.

On cross-examination, petitioner's counsel asked Hunt for the date on which he began his sailmaking business. Hunt was unsure of the date, but said that it was the same month Hunt's partner took " 'his boat down to Columbia with Carl and Tom something, to go and pick up a load.' "

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[1]Petitioner does not have a valid claim under the Jencks Act, 18 U.S.C. 3500, because he failed to demand the receipts following the direct examination of Hunt or Haines. *United States* v. *Petito*, 671 F.2d 68, 73-74 (2d Cir.), cert. denied, 459 U.S. 824 (1982); *United States* v. *Lemus*, 542 F.2d 222, 223 (4th Cir. 1976), cert. denied, 430 U.S. 947 (1977). Although petitioner contends that he relied upon the prosecutor's pretrial assertion that all Section 3500 statements had been delivered to the defense, and thus made no demand at trial, this reliance was unreasonable under the circumstances. The prosecutor's statement that all Section 3500 statements were delivered to the defense occurred during a discussion concerning whether petitioner's counsel might be a witness and was intended merely to advise the court that the defense had enough information to evaluate the decision to have the attorney testify (35 R. 8-19). Nothing in the prosecutor's statement was intended to relieve counsel from requesting Section 3500 statements during trial. And once Haines and Hunt testified about the payments, petitioner should have known that the government would have some record of the disbursements. Accordingly, petitioner should have requested the receipts at trial after Hunt's and Haines' direct examination. In any event, for the reasons stated above, the failure to produce the receipts was harmless and did not affect the fairness of the trial. *United States* v. *Phillips*, 482 F.2d 1355, 1356-1357 (9th Cir. 1973), cert. denied, 419 U.S. 847 (1974) (FBI payment receipts). See also *United States* v. *Del Toro Soto*, 728 F.2d 44, 48 (1st Cir. 1984); *United States* v. *Wables*, 731 F.2d 440, 448-449 (7th Cir. 1984). Finally, petitioner has no claim under Rule 16, Fed. R. Crim. P., because that rule incorporates the limitations of the Jencks Act on discovery of witness statements. Fed. R. Crim. P. 16(a)(2).

Pet. App. A18. Petitioner's counsel immediately objected and requested a mistrial. The court denied the mistrial motion but struck the answer from the record and instructed the jury to disregard it (*ibid.*).

It is of course within the discretion of the trial judge whether to grant a mistrial, because he is in the best position to evaluate the effect on the jury of events at trial. *United States* v. *Laymon,* 621 F.2d 1051, 1053 (10th Cir. 1980). For that reason, the trial court's determination whether a mistrial is warranted is entitled to special weight. *Arizona* v. *Washington,* 434 U.S. 497, 510 (1978). "A criminal trial does not unfold like a play with actors following a script; there is no scenario and can be none. The trial judge must meet situations as they arise and to do this must have broad powers to cope with the complexities and contingencies inherent in the adversary process." *Geders* v. *United States,* 425 U.S. 80, 86 (1976); see also *Quercia* v. *United States,* 289 U.S. 466, 469 (1933). Ordinarily, the effect of even improper evidence can be remedied by admonishing the jury to disregard it. See *Donnelly* v. *DeChristoforo,* 416 U.S. 637, 644 (1974); *Frazier* v. *Cupp,* 394 U.S. 731, 735-736 (1969); *Throckmorton* v. *Holt,* 180 U.S. 552, 567 (1901). It is, of course, presumed that the jury will obey the court's instruction. See *Tennessee* v. *Street,* No. 83-2143 (May 13, 1985), slip op. 5, 7-8; *Francis* v. *Franklin,* No. 83-1590 (Apr. 29, 1985), slip op. 16 n.9; *Shotwell Manufacturing Co.* v. *United States,* 371 U.S. 341, 367 (1963). In any event, as the court of appeals correctly found, Hunt's vague and fleeting remark was not prejudicial to petitioner. And in view of the ample evidence of petitioner's guilt, any error was harmless. See *United States* v. *Hasting,* 461 U.S. 499 (1983).

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Acting Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

THOMAS E. BOOTH
Attorney

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